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No. 08-805

# In the Supreme Court of the United States

SSC ODIN OPERATING COMPANY LLC,
D/B/A ODIN HEALTH CARE CENTER, PETITIONER

*v.*

SUE CARTER, SPECIAL ADMINISTRATOR OF THE
ESTATE OF JOYCE GOTT

*ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT*

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Section 2 of the Federal Arbitration Act (FAA) provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Illinois Nursing Home Care Act (INHCA) renders "null and void" any "waiver by a resident [of a nursing facility] or his legal representative of the right to commence an action" to enforce INHCA and any "waiver of the right to a trial by jury" executed prior to the commencement of any such action. 210 Ill. Comp. Stat. 45/3-606, 3-607. The court below held that § 2 of the FAA does not preempt INHCA's anti-waiver provisions because (1) a violation of public policy is a generally applicable contract defense in Illinois and (2) the "emphatically stated public policy" expressed in INHCA's anti-waiver provisions "concerns the validity, revocability, and enforceability of contracts generally and does not specifically target arbitration agreements." The questions presented are:

1. Whether the emphatically stated public policy of a State precluding the enforcement of arbitration agreements related to a single category of disputes may supersede Congress's declared policy requiring enforcement of arbitration agreements.

2. Whether a state statute must specifically target arbitration agreements in order to be preempted by § 2 of the FAA or whether it is sufficient if the state statute as applied precludes any and all arbitration of disputes between private parties.

## RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner SSC Odin Operating Company LLC, doing business as Odin Health Care Center, is a limited liability company whose sole member is SSC Submaster Holdings LLC. SSC Submaster Holdings LLC is a limited liability company whose sole member is SSC Equity Holdings, LLC. SSC Equity Holdings, LLC is a limited liability company whose sole member is SavaSeniorCare, LLC. SavaSeniorCare, LLC is a limited liability company whose sole member is SVCARE Holdings LLC. SVCARE Holdings LLC is a limited liability company whose sole member is Canyon Sudar Partners, LLC.

No publicly held company owns a 10 percent or greater ownership interest in petitioner.

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# In the Supreme Court of the United States

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT*

## PETITION FOR A WRIT OF CERTIORARI

Petitioner SSC Odin Operating Company LLC, doing business as Odin Health Care Center (the Center), respectfully submits this petition for a writ of certiorari to review the judgment of the Appellate Court of Illinois, Fifth District in this case.

## OPINIONS BELOW

The opinion of the Appellate Court of Illinois (App., *infra*, 1a-11a) is reported at 381 Ill. App. 3d 717, 885 N.E.2d 1204. The order of the Supreme Court of Illinois denying the Center's petition for leave to appeal (App., *infra*, 15a) is reported at 229 Ill. 2d 618, ___ N.E.2d ___. The order of the Circuit

Court for the Fourth Judicial Circuit, Marion County, Illinois (App., *infra*, 12a-14a) is unreported.

## JURISDICTION

The judgment of the Appellate Court of Illinois was entered on April 4, 2008 (App., *infra*, 1a). The Supreme Court of Illinois denied the Center's petition for leave to appeal on September 24, 2008 (App., *infra*, 15a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2 of the United States Constitution (the Supremacy Clause) provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act (FAA), 9 U.S.C. § 2, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon

> such grounds as exist at law or in equity for the revocation of any contract.

The Illinois Nursing Home Care Act (INHCA) provides, in pertinent part:

> § 3-606. Any waiver by a resident or his legal representative of the right to commence an action under Sections 3-601 through 3-607, whether oral or in writing, shall be null and void, and without legal force or effect.
>
> § 3-607. Any party to an action brought under Sections 3-601 through 3-607 shall be entitled to a trial by jury and any waiver of the right to a trial by a jury, whether oral or in writing, prior to the commencement of an action, shall be null and void, and without legal force or effect.

210 Ill. Comp. Stat. 45/3-606 and 3-607.

The Commerce Clause of the United States Constitution, as well as other provisions of the FAA and INHCA, are reprinted in the appendix to this petition (App., *infra*, 16a-19a).

## STATEMENT

In enacting § 2 of the FAA, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). Just last Term, this Court reaffirmed what had already been "well-established" and "repeatedly reaffirmed": § 2 of the FAA preempts conflicting state law in proceedings before state courts. *Preston v. Ferrer*, 128 S. Ct. 978, 983 (2008) (citing *Doctor's Assocs., Inc. v. Casarotto*,

517 U.S. 681, 684-85 (1996); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995); *Perry v. Thomas*, 482 U.S. 483, 489 (1987); *Southland*, 465 U.S. at 15-16).

The Appellate Court of Illinois ignored this Court's well-established FAA jurisprudence, holding that § 2 of the FAA does not preempt INHCA's anti-waiver provisions because (1) a violation of public policy is a generally applicable contract defense in Illinois and (2) the "emphatically stated public policy" expressed in INHCA's anti-waiver provisions "concerns the validity, revocability, and enforceability of contracts generally and does not specifically target arbitration agreements." App., *infra*, 10a. As a result, the lower court held that INHCA's anti-waiver provisions provide a "legitimate state law contract defense of a violation of public policy" that, as applied by the court below, voids every agreement to arbitrate *any* type of dispute arising between nursing facilities and their residents. *Id.*

The ruling of the Appellate Court of Illinois is patently erroneous and conflicts with a long line of this Court's precedent holding that the FAA preempts state laws such as INHCA.

1. Respondent Sue Carter is the special administrator of the estate of Joyce Gott. Ms. Gott was a resident of the Center, which is a skilled nursing facility located in southern Illinois. Upon Ms. Gott's initial admission to the Center, Ms. Carter and the Center executed a Health Care Arbitration Agreement (App., *infra*, 20a). Ms. Gott was discharged from the Center and was later readmitted. Upon her readmission, Ms. Gott and the Center executed a second Health Care Arbitration Agreement substan-

tially similar to the first agreement (App., *infra*, 34a).

In both agreements, the parties agreed to submit to binding arbitration "all disputes against each other and their representatives arising out of or in any way related or connected to [Ms. Gott's] Admission Agreement and all matters related thereto including matters involving [Ms. Gott's] stay and care provided at the [Center]." App., *infra*, 22a, 29a. Specifically included within the scope of the agreements were "any disputes concerning whether any statutory provisions relating to [Ms. Gott's] rights under Illinois law were violated." App., *infra*, 22a, 29a.

In addition, the parties expressly agreed that both agreements were governed by the FAA. App., *infra*, 22a, 29a. The parties recognized that the agreements involved interstate commerce because, among other things, the Center was affiliated with a "foreign corporation with a nationwide network of over 250 nursing facilities, all of which are fully engaged in interstate commerce by activity that includes, but is not limited to, execution of interstate contracts relating to services, management and interstate marketing, acceptance of federal funds as a significant source of income, regulation by federal statutes and the use of goods, services, employees and management personnel in multiple states." App., *infra*, 21a, 28a.

The agreements also expressly stated that each party waived its right to a jury trial, stating in all capital letters:

> YOU CANNOT BE REQUIRED TO SIGN THIS AGREEMENT IN ORDER TO RECEIVE TREATMENT. BY SIGNING THIS AGREEMENT, YOUR RIGHT TO TRIAL BY A JURY OR A JUDGE IN A COURT WILL BE BARRED AS TO ANY DISPUTE RELATING TO INJURIES THAT MAY RESULT FROM NEGLIGENCE DURING YOUR TREATMENT OR CARE, AND WILL BE REPLACED BY AN ARBITRATION PROCEDURE.

App., *infra*, 25a, 32a. Under each agreement, Ms. Gott and Ms. Carter were given the ability to rescind the agreements by providing written notice to the Center within thirty days of signing the agreements. App., *infra*, 25a, 32a. The agreements also stipulated that the Center would pay all arbitrator fees and up to $5,000 of attorney's fees Ms. Gott or Ms. Carter incurred in any arbitration. App., *infra*, 21a, 28a.

2. Ms. Gott passed away after her readmission to the Center. Several months later, Ms. Carter filed a civil action against the Center in the Circuit Court for the Fourth Judicial Circuit, Marion County, Illinois. In her two-count complaint (App., *infra*, 34a-39a), Ms. Carter alleged that the Center failed to provide adequate care to Ms. Gott and that the Center's acts or omissions resulted in Ms. Gott's death. The first count of Ms. Carter's complaint alleged that the Center's acts or omissions violated INHCA. The second count, which was brought under the Illinois Wrongful Death Act, alleged that the Center's treatment of Ms. Gott had been negligent.

The Center moved to compel arbitration, filing an affidavit in support of its motion setting forth facts

establishing the arbitration agreements involved interstate commerce within the meaning of the FAA. Ms. Carter neither challenged this evidence nor produced any evidence to the contrary. Instead, she argued that the arbitration agreements were void and unenforceable under INHCA. Ms. Carter also argued that the arbitration agreements were unenforceable due to lack of mutuality and that the agreements to arbitrate Ms. Gott's claims did not preclude Ms. Carter from bringing her claim under the Illinois Wrongful Death Act. Ms. Carter did not contend or produce evidence in the Circuit Court that the arbitration agreements were unconscionable, nor did she argue that they were the product of fraud, duress or undue influence.

3. The Circuit Court denied the Center's motion to compel arbitration without conducting an evidentiary hearing. App., *infra*, 12a-14a. With regard to the complaint's INHCA cause of action, the Circuit Court concluded that the arbitration agreements were unenforceable because they were "in direct violation of emphatically stated public policy and for lack of mutuality." *Id.* at 13a. The Circuit Court also concluded that the FAA did not apply because "in the aggregate the economic activity does not represent general practice subject to federal control." *Id.* at 14a.

With respect to the complaint's wrongful-death cause of action, the Circuit Court reasoned that, although the decedent (Ms. Gott) was bound by the agreements with regard to her own claims, a plaintiff such as Ms. Carter bringing a wrongful-death claim on behalf of Ms. Gott's estate was not bound by the agreements. *Id.* at 13a.

4. The Appellate Court of Illinois affirmed the Circuit Court's ruling. App., *infra*, 1a. After determining that a violation of public policy is a generally applicable contract defense in Illinois (*id.* at 6a), the Appellate Court of Illinois looked to language from this Court's decision in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), in which this Court—quoting from its earlier decision in *Perry v. Thomas*, 482 U.S. 483 (1987)—observed:

> In *Perry*, we reiterated: "[S]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with [the text of § 2]."

*Casarotto*, 517 U.S. at 685 (quoting *Perry*, 482 U.S. at 492 n.9) (emphasis supplied by *Perry* Court; brackets supplied by *Casarotto* Court).

According to the Appellate Court of Illinois, application of *Casarotto* and *Perry* meant that INHCA's anti-waiver provisions were not preempted because neither provision "mentions arbitration agreements at all, nor by their terms are they limited to those agreements. The sections, by their explicit terms, apply equally to all contracts attempting to restrict the right of nursing home residents to 'commence an action' pursuant to [INHCA] or to waive the right to a trial by a jury in an action commenced pursuant to [INHCA], regardless of whether the contract involves arbitration." App., *infra*, 8a-9a. Furthermore, "to the extent that [INHCA's anti-waiver provisions] may void agreements calling for arbitration," the

Appellate Court of Illinois held that it was "an incidental, tangential effect of the sections, not their primary purpose, and so the sections can hardly be said to specifically target arbitration agreements." *Id.* at 9a (quotation omitted). "Although it is certainly true that if [INHCA] expressly directed its prohibitions only at arbitration agreements it would, as the defendant contends, run afoul of the [FAA]," INHCA did "no such thing," in the opinion of the Appellate Court of Illinois. *Id.*

"Applying the *Casarotto* and [*Perry*] rule to the facts in this case," the Appellate Court of Illinois held that "because the public policy expressed in [INHCA's anti-waiver provisions] concerns the validity, revocability, and enforceability of contracts generally and does not specifically target arbitration agreements, it presents a legitimate state law contract defense of a violation of public policy to the agreements and so voids the agreements." *Id.* at 9a-10a. Without any substantive explanation, the Appellate Court of Illinois extended its ruling to include the complaint's wrongful-death cause of action, holding that the same "emphatically stated public policy" embodied in INHCA's anti-waiver provisions precluded arbitration of the wrongful-death cause of action as well. *Id.* at 10a.

5. The Supreme Court of Illinois subsequently denied the Center's petition for leave to appeal. App., *infra*, 15a.

## REASONS FOR GRANTING THE PETITION

This Court's review is necessary to ensure the proper and uniform application of the FAA. The lower court's decision stands in direct conflict with

this Court's decisions in *Preston* and *Southland*, both of which demonstrate that a state statute need not "specifically target" arbitration agreements in order to be preempted by § 2 of the FAA if the state statute as applied precludes the enforcement of arbitration agreements. The unanimous rulings of four federal circuit courts of appeals provide further evidence that the ruling below is patently erroneous.

Moreover, as this Court recognized in *Southland*, the "public policy" logic of the decision below would allow States to "wholly eviscerate" federally protected arbitration rights. *Southland*, 465 U.S. at 17 n.11. The decision below held that States may enact statutes that have the effect of precluding the enforcement of arbitration agreements so long as the state statute does not expressly mention arbitration. This Court considered—and expressly rejected—that argument in *Southland*, holding that Congress's pro-arbitration policy choice supersedes any contrary policy choice made by a State.

Accordingly, the Court should grant the petition for a writ of certiorari and, as it has done under similar circumstances, summarily reverse the judgment of the Appellate Court of Illinois. *See, e.g.*, *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 57 (2003) (per curiam) (reversing summarily state supreme court ruling imposing an unduly narrow interpretation of the FAA's "involving commerce" requirement because this Court's decision fell "well within [its] previous pronouncements"). Alternatively, the Court should grant the petition for a writ of certiorari, consider this case on the merits and reverse the judgment of the Appellate Court of Illinois.

## I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S UNAMBIGUOUS PRECEDENT ADDRESSING THE PREEMPTIVE EFFECT OF THE FEDERAL ARBITRATION ACT

### A. *Preston* and *Southland* Demonstrate That a State Statute Need Not "Specifically Target" Arbitration In Order to be Preempted and that the "Public Policy" Logic of the Court Below Is Invalid

Section 2 of the FAA "supplies not simply a procedural framework applicable in federal courts; it also calls for the application, in state as well as federal courts, of federal substantive law regarding arbitration." *Preston v. Ferrer*, 128 S. Ct. 978, 981 (2008). For example, "when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA." *Id.* at 987.

In *Preston*, an actor and his manager had agreed to arbitrate disputes arising under a management contract. *See id.* at 982-83. The plaintiff-manager later claimed that he was owed fees under the contract, but the defendant-actor claimed the contract was void because the plaintiff-manager was acting as an unlicensed talent agent. *See id.*

California's Talent Agencies Act specified that "[i]n cases of controversy arising under this chapter, the parties involved *shall* refer the matters in dispute to the Labor Commissioner, who shall hear and determine the same, subject to an appeal within 10 days after determination, to the superior court where

the same shall be heard de novo." Cal. Lab. Code Ann. § 1700.44(a) (West 2003 & Supp. 2008) (emphasis added). Following the procedure prescribed by the state statute, the defendant-actor petitioned the state labor commissioner to decide whether the contract was unenforceable because it violated a state law requiring licensure of talent agents. *See Preston*, 128 S. Ct. at 982-83. The plaintiff-manager moved to compel arbitration, but the California Court of Appeal eventually refused to do so because it believed the FAA did not preempt actions before an administrative agency with exclusive jurisdiction over a dispute. *Id.*

After the Supreme Court of California denied the plaintiff-manager's petition for review, this Court granted the plaintiff-manager's petition for a writ of certiorari and reversed the judgment of the California Court of Appeal, finding that the issue was simply "who decides whether [the plaintiff-manager] acted as personal manager or as a talent agent." *Id.* at 987. In reversing the California Court of Appeal, this Court concluded that the motion to compel arbitration raised solely the question of which forum would hear the parties' dispute and the parties had not forfeited any substantive claims under the statute. *Id.* They were merely submitting to resolution in an arbitral, rather than a judicial or administrative, forum. *Id.* In other words, the parties had not waived causes of action under the state statute; instead, they had agreed who would decide such issues, and that "who" was an arbitrator.

As the Court itself acknowledged, the holding of *Preston* was hardly groundbreaking. *See id.* at 984 (recognizing that existing precedent "largely, if not

entirely, resolve[d] the dispute before" the Court). This Court faced a similar question almost twenty-five years earlier in *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

In *Southland*, a California statute designed to protect franchisees contained an anti-waiver provision similar to those at issue here, which stated that "[a]ny condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void." *Id.* at 10 (citation omitted). Like INHCA's anti-waiver provisions and the state statute at issue in *Preston*, the state statute in *Southland* did not expressly mention arbitration. Despite that fact, the *Southland* Court reversed a Supreme Court of California decision refusing to compel arbitration, finding that the FAA withdraws the "power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Id.* at 12.

Moreover, the opinion for the Court in *Southland* expressly rejected the "public policy" theory adopted by the Appellate Court of Illinois in the case below. In recognizing that § 2 of the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any* contract," 9 U.S.C. § 2 (emphasis added), the Court explained that § 2's savings clause did not allow state legislatures to countermand the pro-arbitration policy choice made by Congress.

In particular, the opinion for the Court responded to the dissenting opinion of Justice Stevens, which, applying the same "public policy" rationale adopted

by the Appellate Court of Illinois here, stated in relevant part:

> A contract which is deemed void is surely revocable at law or in equity, and the California legislature has declared all conditions purporting to waive compliance with the protections of the Franchise Disclosure Act, including but not limited to arbitration provisions, void as a matter of public policy. Given the importance to the State of franchise relationships, the relative disparity in the bargaining positions between the franchisor and the franchisee, and the remedial purposes of the California Act, I believe this declaration of State policy is entitled to respect.
>
> * * * * *
>
> We should not refuse to exercise independent judgment concerning the conditions under which an arbitration agreement, generally enforceable under the [FAA], can be held invalid as contrary to public policy simply because the source of the substantive law to which the arbitration agreement attaches is a State rather than the Federal Government.

*Southland*, 465 U.S. at 20-21 (Stevens, J., dissenting).

In response, the opinion for the Court in *Southland* expressly rejected the dissent's "public policy" theory adopted by the Appellate Court of Illinois here, stating in relevant part:

> JUSTICE STEVENS dissents in part on the ground that § 2 of the Arbitration Act permits a party to nullify an agreement to arbitrate on "such

> grounds as exist at law or in equity for the revocation of any contract." We agree, of course, that a party may assert general contract defenses such as fraud to avoid enforcement of an arbitration agreement. We conclude, however, that the defense to arbitration found in the California Franchise Investment Law is not a ground that exists at law or in equity "for the revocation of *any* contract" but merely a ground that exists for the revocation of arbitration provisions in contracts subject to the California Franchise Investment Law. Moreover, under this dissenting view, "a state policy of providing special protection for franchisees . . . can be recognized without impairing the basic purposes of the federal statute." If we accepted this analysis, states could wholly eviscerate Congressional intent to place arbitration agreements upon the same footing as other contracts . . . simply by passing statutes such as the Franchise Investment Law. We have rejected this analysis because it is in conflict with the Arbitration Act and would permit states to override the declared policy requiring enforcement of arbitration agreements.

*Southland*, 465 U.S. at 16-17 n.11 (citations omitted; ellipses in original).

Despite this Court's decision in *Southland*, the Appellate Court of Illinois held that "because the public policy expressed in [INHCA's anti-waiver provisions] concerns the validity, revocability, and enforceability of contracts generally and does not specifically target arbitration agreements, it presents a legitimate state law contract defense of a violation of public policy to the agreements and so voids the

agreements." App., *infra*, 10a. The "defense to arbitration found in" INHCA's anti-waiver provisions, however, "is not a ground that exists at law or in equity 'for the revocation of *any* contract' but merely a ground that exists for the revocation of arbitration provisions in contracts subject to [INHCA]." *Southland*, 465 U.S. at 16 n.11. As a result, the Appellate Court of Illinois committed plain error in the face of unambiguous precedent when it held the FAA does not preempt INHCA's anti-waiver provisions, which as applied preclude the enforcement of otherwise valid arbitration agreements such as those at issue here.

That a violation of public policy is a generally applicable contract defense in Illinois does not change this conclusion. Violation of public policy is a well-established common-law contract defense. Indeed, the Restatement (Second) of Contracts dedicates an entire chapter to the subject. *See* Restatement (Second) of Contracts ch. 8 (1981). As *Southland* recognized, however, the Supremacy Clause instructs that *Congress's* pro-arbitration policy choice controls over any contrary policy choice made by a State. In sum, the "public policy" analysis of the Illinois Court of Appeals "is in conflict with the [FAA] and would permit states to override the declared policy requiring enforcement of arbitration agreements." *Southland*, 465 U.S. at 17 n.11.

### B. The Decision Below Is Based on a Clear Misreading of *Perry* and *Casarotto*

In *Perry v. Thomas*, 482 U.S. 483 (1987), the Court was asked to decide whether § 2 of the FAA preempted § 229 of the California Labor Code. On its face, the state statute in question "singled out"

arbitration agreements, providing that suits for the collection of wages could be maintained "without regard to the existence of any private agreement to arbitrate." *Id.* at 484 (quoting Cal. Lab. Code Ann. § 229 (West 1971)). The Court found that the pro-arbitration policy of the FAA placed it in "unmistakable conflict with California's § 229 requirement that litigants be provided a judicial forum for resolving wage disputes." *Id.* at 491. As a result, the Court held that the state statute had to "give way" under the Supremacy Clause. *Id.*

In finding the state statute preempted, the opinion for the Court included a footnote reading, in relevant part:

> In instances such as these, the text of § 2 provides the touchstone for choosing between state-law principles and the principles of federal common law envisioned by the passage of that statute: An agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law*, *see Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983), "save upon such grounds as exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). Thus state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2. . . . A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner

> different from that in which it otherwise construes nonarbitration agreements under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot.

*Id.* at 492 n.9 (citations omitted).

Several years later, in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), the Court held that the FAA preempted a Montana statute conditioning the enforceability of arbitration agreements on compliance with a first-page notice requirement. As in *Perry*, the state statute at issue in *Casarotto* "singled out" arbitration by making arbitration clauses "unenforceable unless '[n]otice that [the] contract is subject to arbitration' is 'typed in underlined capital letters on the first page of the contract.'" *Id.* at 683 (quoting Mont. Code Ann. § 27-5-114(4) (1995)) (brackets supplied by *Casarotto* Court). In finding the state statute preempted, the Court referenced the *Perry* footnote and explained that, under the savings clause of § 2 of the FAA, courts could not "invalidate arbitration agreements under state laws applicable only to arbitration provisions." *Id.* at 687.

Read correctly, *Perry* and *Casarotto* stand for the proposition that § 2 of the FAA preempts those state laws that "single out" arbitration agreements for special treatment. As demonstrated by *Southland* and *Preston*, however, *Perry* and *Casarotto* do *not* stand for the converse proposition: namely, that state laws avoid FAA preemption so long as they do not "single out" arbitration agreements for special treatment. Instead, *Southland* and *Preston* make

clear that state statutes are preempted by the FAA if the state statutes *as applied* preclude the enforcement of federally protected arbitration rights, regardless of whether the state statutes "single out" or "specifically target" arbitration agreements. The decision of the Appellate Court of Illinois is predicated on a misunderstanding of this fundamental concept.

## II. THE DECISION BELOW CONFLICTS WITH THE LAW OF FOUR FEDERAL CIRCUITS ADDRESSING THE PREEMPTIVE EFFECT OF THE FEDERAL ARBITRATION ACT

In relevant part, § 2 of the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). Contrary to the decision below, the federal courts of appeals have unanimously held that the FAA preempts a state law that invalidates only certain types of clauses in some, but not all, contracts, regardless of whether the state law mentions arbitration. *See Bradley v. Harris Research, Inc.*, 275 F.3d 884, 889-90 (9th Cir. 2001); *OPE Int'l LP v. Chet Morrison Contractors, Inc.*, 258 F.3d 443, 447 (5th Cir. 2001) (per curiam); *KKW Enters., Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.*, 184 F.3d 42, 50-51 (1st Cir. 1999); *Doctor's Assocs., Inc. v. Hamilton*, 150 F.3d 157, 163 (2d Cir. 1998), *cert. denied*, 525 U.S. 1103 (1999) (No. 98-630).

In *Bradley v. Harris Research, Inc.*, 275 F.3d 884 (9th Cir. 2001), the Ninth Circuit was asked to decide whether the FAA preempted a California statute

that had the effect of voiding forum-selection clauses in franchise agreements if the clauses restricted venue to an out-of-state forum. *See id.* at 889.[1] Relying on decisions from the First, Second and Fifth Circuits, the Ninth Circuit held that § 2 of the FAA preempted the California statute because the California statute applied "only to forum selection clauses and only to franchise agreements; it therefore does not apply to 'any contract.'" *Id.* at 890 (quoting 9 U.S.C. § 2).

In *Bradley*, the appellee-franchisees contended—like the Appellate Court of Illinois in this case—that the California statute was not preempted "because it treats arbitration and litigation equally and does not single out arbitration as a disfavored form of dispute resolution." *Id.* at 889. The Ninth Circuit rejected that argument outright, holding that "only state law that addresses the enforcement of 'contracts generally' is not preempted by the FAA." *Id.* (quoting *Casarotto*, 517 U.S. at 686-87). As *Bradley* explained, even if a state statute places arbitration on "equal footing" with litigation, it is preempted by the FAA if it invalidates only certain types of clauses in certain types of contracts. *See id.*

The Fifth Circuit applied similar reasoning in *OPE International LP v. Chet Morrison Contractors,*

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[1] The California statute at issue in *Bradley* provided that "[a] provision in a franchise agreement restricting venue to a forum outside this state is void with respect to any claim arising under or relating to a franchise agreement involving a franchise business operating within this state." Cal. Bus. & Prof. Code Ann. § 20040.5.

*Inc.*, 258 F.3d 443 (5th Cir. 2001) (per curiam). There, the appellant argued that the arbitration agreement in question was invalid under a Louisiana statute that voided out-of-state forum-selection clauses in certain construction contracts. *See id.* at 446.[2] The Fifth Circuit disagreed, holding that a state law that places a requirement on arbitration clauses "not applicable to contracts generally" is preempted by § 2 of the FAA. *Id.* at 447. The Fifth Circuit held that the state statute, which did not "specifically target" arbitration for special treatment, "'directly conflicts with § 2 of the FAA because the State's law conditions the enforceability of arbitration agreements on compliance with a . . . requirement not applicable to contracts generally.'" *Id.* (quoting *Casarotto*, 517 U.S. at 687) (alteration omitted); *see also Commerce Park v. Mardian Constr. Co.*, 729 F.2d 334, 337 (5th Cir. 1984) (holding that state statute, which voided any waiver of rights under a state deceptive trade practices statute, was preempted by the FAA even though the state statute did not mention arbitration).

To the same effect is *KKW Enterprises, Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.*, 184 F.3d 42 (1st Cir. 1999). There, the First Circuit held that a Rhode Island statute applicable only to forum-selection clauses in franchise agreements was

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[2] The Louisiana statute at issue in *OPE International* rendered "null and void and unenforceable as against public policy any provision in a contract" for certain types of construction that required a "suit or arbitration proceeding to be brought in a forum or jurisdiction outside of this state." La. Rev. Stat. Ann. § 9:2779.

preempted by § 2 of the FAA because the state statute "[did] not apply to all contracts and [did] not establish a generally applicable contract defense." *Id.* at 52. Like the state statutes addressed by *Bradley* and *OPE International*, the Rhode Island statute at issue in *KKW Enterprises* voided any provision in a franchise agreement restricting venue to an out-of-state forum. *See id.* at 50.[3] The First Circuit reasoned that only state statutes that apply to "any contract" are consistent with the FAA. *Id.* at 50-51. "Because [the state statute] limits the statute's application to one type of provision, venue clauses, in one type of agreement, franchise agreements, the statute does not apply to *any* contract." *Id.* at 51. Therefore, the First Circuit held that the Rhode Island statute was preempted by the FAA. *Id.*

Similarly, in *Doctor's Associates, Inc. v. Hamilton*, 150 F.3d 157 (2d Cir. 1998), *cert. denied*, 525 U.S. 1103 (1999) (No. 98-630), the Second Circuit held that § 2 of the FAA preempted a rule of law established by the Supreme Court of New Jersey in *Kubis & Perszyk Associates, Inc. v. Sun Microsystems, Inc.*, 680 A.2d 618 (N.J. 1996), in which the state high court found that a forum-selection clause in a franchise agreement was presumptively invalid under the New Jersey Franchise Practices Act if the clause designated an out-of-state judicial forum. The franchisee in *Hamilton* argued that the state-law

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[3] The Rhode Island statute at issue in *KKW Enterprises* read: "A provision in a franchise agreement restricting jurisdiction or venue to a forum outside this state is void with respect to a claim otherwise enforceable under this act." R.I. Gen. Laws § 19-28.1-14.

precedent should be extended to invalidate such forum-selection clauses as they related to arbitration. *See* 150 F.3d at 163. The Second Circuit rejected the franchisee's argument, explaining:

> *Kubis* did not establish a "generally applicable" contract defense that applies to "any" contract; it invalidated a franchise agreement's forum selection clause under the New Jersey Franchise Practices Act because it required the franchisee to sue in another jurisdiction. The *Kubis* decision applies to one sort of contract provision (forum selection) in only one type of contract (a franchise agreement). Therefore, to the extent that *Kubis* can be read to invalidate arbitral forum selection clauses in franchise agreements, it is preempted by the FAA.

*Id.*; *see also Stawski Distrib. Co. v. Browary Zywiec S.A.*, 349 F.3d 1023, 1024-26 (7th Cir. 2003) (overturning district court order denying a "stay [of] litigation in favor of arbitration" and holding that Illinois statute governing contracts between brewers and distributors was preempted because it did not apply generally to all contracts).

These cases demonstrate that four federal courts of appeals have applied the unambiguous language of § 2's savings clause to hold that courts may not refuse to enforce arbitration agreements based on state-law grounds other than "grounds that exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). A state law that invalidates only certain types of clauses in certain types of contracts is not a "ground[] that exist[s] at law or in equity for the revocation of any contract," and therefore any such state law is preempted by the

FAA to the extent that it precludes enforcement of arbitration agreements.

Because INHCA's anti-waiver provisions invalidate only certain types of clauses (waivers of the right to commence an action under INHCA and to have such cases tried by a jury) in certain types of contracts (agreements subject to INHCA), well-established circuit precedent demonstrates that the savings clause of § 2 does not apply and the Appellate Court of Illinois's ruling is erroneous.

## III. THE PETITION RAISES SUBSTANTIAL QUESTIONS OF FEDERAL LAW

"The 'singling out' theory"—whereby courts hold that a state statute must "specifically target" or "single out" arbitration agreements in order to be preempted by the FAA—is best viewed as a "backdoor attempt to have the Supreme Court overrule *Southland*, which it already has refused to do." Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 Ind. L.J. 393, 410 (2004) (*Drahozal*). Professor Drahozal correctly observes that the "'singling out' phrasing comes from language in Supreme Court cases, not from the [FAA] itself, and is contraindicated by other language in the Court's own opinions." *Id.* at 409 (footnotes omitted). Echoing the concern expressed by this Court in *Southland*, Professor Drahozal concludes that

> the "singling out" interpretation of FAA preemption would permit states to eviscerate the FAA entirely. Under that interpretation, a state law that invalidated all pre-dispute waivers of the right to jury trial would not be preempted by the FAA because it did not single out arbitration

> clauses: it also would invalidate jury trial waivers in court selection clauses. And yet such a state law would make arbitration agreements wholly unenforceable in the state, because by definition arbitration clauses provide for an arbitrator, rather than a jury, to resolve the parties' dispute. Nothing in the FAA or the Supreme Court's interpretations of the FAA supports such a result. In short, courts should reject the view that the FAA preempts only state laws that single out arbitration clauses.

*Id.* at 410 (footnotes omitted).

Contrary to the decision below, federal preemption analysis does not look solely to the language of the state statute to determine whether it is preempted by federal law. "[S]tate law may nonetheless be preempted to the extent that it actually conflicts with federal law—that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Volt Info. Scis., Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1988) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

Nor is the state statutory language at issue here unique to Illinois. At least two other States have enacted virtually identical anti-waiver provisions in the nursing facility context. Oklahoma's Nursing Home Care Act, for example, provides that "[a]ny waiver by a resident or the legal representative of the resident of the right to commence an action under this section, whether oral or in writing, shall be null and void, and without legal force or effect." Okla. Stat. tit. 63, § 1-1939(D). In similar fashion, the Oklahoma statute also provides that "[a]ny party to an

action brought under this section shall be entitled to a trial by jury and any waiver of the right to a trial by a jury, whether oral or in writing, prior to the commencement of an action, shall be null and void, and without legal force or effect." § 1-1939(E); *see also* W. Va. Code § 16-5C-15(c) ("Any waiver by a resident [of a nursing facility] or his or her legal representative of the right to commence an action under this section, whether oral or in writing, shall be null and void as contrary to public policy.").

Unlike the decision of the Appellate Court of Illinois in this case, however, the FAA has been held to preempt Oklahoma's identical anti-waiver provisions. In *Rainbow Health Care Center, Inc. v. Crutcher*, No. 07-CV-194-JHP, 2008 WL 268321 (N.D. Okla. Jan. 29, 2008), a nursing facility filed suit against the head of a state regulatory agency seeking a declaratory judgment that Oklahoma's anti-waiver provisions were preempted by the FAA after the state agency threatened to revoke the plaintiff-facility's license because the plaintiff-facility included certain arbitration provisions in its admission agreements. *See id.* at *1. The district court held the FAA did in fact preempt Oklahoma's anti-waiver provisions, explaining: "In enacting the FAA, Congress expressed a national policy favoring enforcement of arbitration agreements, and there is nothing to suggest that Congress ever intended to carve out an exception to that broad policy allowing the state of Oklahoma to *disfavor* arbitration agreements in nursing home admission agreements." *Id.* at *8. The defendant-official did not appeal the district court's ruling.

A different federal district court in Oklahoma reached a similar conclusion in *Sooner Geriatrics, L.L.C. v. Crutcher*, No. CIV-07-244-M, 2007 WL 2900535 (W.D. Okla. Oct. 3, 2007). There, the district court granted several nursing facilities' request for a preliminary injunction after the same state regulatory agency cited the plaintiff-facilities for including certain arbitration provisions in their admission agreements that the state agency believed violated Oklahoma's anti-waiver provisions. *See id.* at *6. The district court later converted its preliminary injunction into a permanent injunction after the defendant-official failed to contest the plaintiff-facilities' motion to confess judgment, finding that the FAA preempted Oklahoma's anti-waiver provisions. *See Sooner Geriatrics, L.L.C. v. Crutcher*, No. CIV-07-244-M, slip op. (W.D. Okla. May 27, 2008). As in *Rainbow Health Care Center*, the defendant-official in *Sooner Geriatrics* did not appeal the district court's ruling.

Despite these federal court rulings holding that Oklahoma's anti-waiver provisions are preempted by the FAA, Oklahoma's state courts have proven extremely hostile to claims that the FAA preempts Oklahoma's anti-waiver provisions. In *Bruner v. Timberland Manor Ltd. Partnership*, 155 P.3d 16 (Okla. 2006), the Supreme Court of Oklahoma upheld a trial court's refusal to enforce an arbitration agreement between a nursing facility and a resident after the trial court held the FAA did not preempt Oklahoma's anti-waiver provisions. To reach this result, the *Bruner* court applied an overly narrow construction of the FAA, finding that the FAA did not reach what the court characterized as the "pro-

foundly local transaction" evidenced by the agreement between the nursing facility and its resident. *Id.* at 31. In doing so, the *Bruner* court expressly disagreed with contrary rulings issued by three other state supreme courts. *See id.* at 29-30 (disagreeing with *McGuffrey Health & Rehab. Ctr. v. Jackson*, 864 So. 2d 1061 (Ala. 2003); *Vicksburg Partners, L.P. v. Stephens*, 911 So. 2d 507 (Miss. 2005); and *In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67 (Tex. 2005)). *But see Rainbow Health Care Center*, 2008 WL 268321, at *6 (rejecting *Bruner*'s interstate-commerce analysis); Stanley A. Leasure, *Arbitration of Nursing Home Claims: Oklahoma Goes Its Own Way*, 60 Okla. L. Rev. 737, 767-68 (2007) (questioning *Bruner*'s reasoning in light of contrary state supreme court rulings).

There is only one FAA, the interpretation of which should be uniform regardless of whether one sues in state court or in federal court. As *Rainbow Health Care Center*, *Sooner Geriatrics*, *Bruner* and the decision below demonstrate, such is not the case in the context of arbitration agreements between nursing facilities and their residents.

This case implicates much more than just state statutes related to disputes between nursing facilities and their residents, however. This case—and the obvious disregard for this Court's FAA jurisprudence evidenced throughout the lower court's decision—implicates the very type of judicial hostility to arbitration § 2 of the FAA was designed to overcome. The "specifically target" theory adopted by the court below represents the second front in state courts' efforts to circumvent this Court's FAA jurisprudence. *See Drahozal*, 79 Ind. L.J. at 410.

"[C]ourts must be on guard for artifices in which the ancient suspicion of arbitration might reappear." *Securities Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1119 (1st Cir. 1989). The rule adopted by the Appellate Court of Illinois, whereby a state statute may avoid FAA preemption if a violation of public policy is a generally applicable contract defense and the state statute in question does not "specifically target" arbitration agreements, is one such "artifice" that must be rejected outright lest the lower court's decision serve as a roadmap for how other state courts and state legislatures can frustrate the pro-arbitration policy choice made by Congress through the use of selective (and patently erroneous) parsing of this Court's FAA jurisprudence.

## CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari and summarily reverse the judgment of the Appellate Court of Illinois. Alternatively, the Court should grant the petition for a writ of certiorari, consider this case on the merits and reverse the judgment of the Appellate Court of Illinois.

Respectfully submitted.

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DECEMBER 2008

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# APPENDICES

## APPENDIX A

NOTICE

Decision filed 04/04/08. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

NO. 5-07-0392

IN THE

APPELLATE COURT
OF ILLINOIS

FIFTH DISTRICT

| | | |
|---|---|---|
| SUE CARTER, Special Administrator of the Estate of Joyce Gott, Deceased, | ) | |
| Plaintiff-Appellee, | ) | Appeal from the Circuit Court of Marion County. |
| v. | ) | No. 06-L-75 |
| SSC ODIN OPERATING COMPANY, LLC, d/b/a Odin Healthcare Center, | ) | Honorable David L. Sauer, Judge, presiding. |
| Defendant-Appellant. | ) | |

JUSTICE SPOMER delivered the opinion of the court:

The defendant, SSC Odin Operating Company, LLC, doing business as Odin Healthcare Center, appeals an order of the circuit court of Marion County denying the defendant's motion to compel arbitration

in the present lawsuit brought by the plaintiff, Sue Carter, as the special administrator of the estate of Joyce Gott, deceased. For the reasons that follow, we affirm the order of the circuit court.

## BACKGROUND

The facts necessary to our disposition of this appeal are undisputed by the parties and are as follows. The plaintiff, Sue Carter, is the special administrator of the estate of Joyce Gott, deceased. Joyce was a resident of the defendant's facility, Odin Healthcare Center (Odin), in Odin, Illinois, from May 20, 2005, until July 29, 2005, and again from January 12, 2006, until her death on January 31, 2006. At the outset of Joyce's first stay at Odin, the plaintiff, acting not on her own behalf, but as Joyce's legal representative, executed a written "Health Care Arbitration Agreement" with the defendant; at the outset of Joyce's second stay at Odin, Joyce executed a second written "Health Care Arbitration Agreement" with the defendant, the terms of which are identical to those of the first agreement. In pertinent part, the two "Health Care Arbitration Agreements" (the agreements) require that all disputes between Joyce and the defendant related to Joyce's care at Odin be submitted to binding arbitration. By their own terms, however, the agreements do not apply "to any dispute where the amount in controversy is less than two hundred thousand ($200,000.00) dollars." Within the agreements, Joyce and the defendant expressly agree that the agreements will be governed by the Federal Arbitration Act (9 U.S.C. §1 *et seq.* (2000)).

Following Joyce's January 31, 2006, death, the plaintiff filed, on November 22, 2006, the instant

two-count lawsuit, alleging in count I a statutory survival action pursuant to the Probate Act of 1975 (755 ILCS 5/27-6 (West 2006)) and the Nursing Home Care Act (210 ILCS 45/1-101 *et seq.* (West 2006)) (the survival action) and in count II a statutory action under the Wrongful Death Act (740 ILCS 180/0.10 *et seq.* (West 2006)) (the wrongful death action). In both counts, the plaintiff alleged that the defendant had failed to provide adequate and properly supervised care as needed by Joyce. In the survival action count, the plaintiff alleged that the defendant's acts and/or omissions resulted in Joyce suffering pain and suffering, emotional distress, and mental anguish between January 12, 2006, and January 31, 2006. In the wrongful death action count, the plaintiff alleged that the defendant's acts and/or omissions resulted in Joyce's death and therefore the loss of Joyce's companionship and society for her heirs.

On December 26, 2006, the defendant filed an answer to the plaintiff's complaint, denying in pertinent part the allegations therein and asserting a number of affirmative defenses, including the defense that both counts of the lawsuit were precluded by the agreements, which required the disputes contained therein to be resolved by binding arbitration. On January 11, 2007, the plaintiff filed a reply to the affirmative defenses, denying them, and filed a motion to strike a number of the defenses, which are not relevant to this appeal. On March 5, 2007, the defendant filed a motion to compel arbitration, a memorandum of law in support of that motion, a copy of each of the agreements, and an affidavit of an employee of the defendant that sets forth facts that

the defendant alleges establish that the agreements involve interstate commerce within the meaning of the Federal Arbitration Act. On April 19, 2007, the plaintiff filed a memorandum of law in opposition to the motion to compel arbitration. In that memorandum and in a supplemental memorandum filed by the plaintiff on June 20, 2007, the plaintiff argued, *inter alia*, that (1) a violation of public policy is a legitimate generally applicable defense to all contracts in Illinois, (2) legitimate generally applicable state defenses to all contracts are not preempted by the Federal Arbitration Act, and (3) the agreements are in violation of this state's public policy, as set forth in sections 3-606 and 3-607 of the Nursing Home Care Act (210 ILCS 45/3-606, 3-607 (West 2006)), and so are void.

On June 20, 2007, the trial judge entered an order denying the defendant's motion to compel arbitration. With regard to the wrongful death action, the judge reasoned that although Joyce was bound by the agreements with regard to her own claims, a plaintiff bringing a wrongful death claim on behalf of an estate was not bound by the agreements. With regard to the survival action, the judge concluded that the agreements were not enforceable because they were "in direct violation of emphatically stated public policy and for lack of mutuality" and because, with regard to interstate commerce, "in the aggregate the economic activity does not represent general practice subject to federal control." A timely notice of interlocutory appeal was filed by the defendant, and this appeal followed.

## STANDARD OF REVIEW

An order to compel arbitration is injunctive in nature and is appealable under Supreme Court Rule 307(a)(1) (188 Ill. 2d R. 307(a)(1)). *Peach v. CIM Insurance Corp.*, 352 Ill. App. 3d 691, 694 (2004) (citing *Salstz v. Kreiss*, 198 Ill. 2d 1, 11 (2001)). Generally, the standard employed in reviewing an interlocutory order granting or denying a motion to compel arbitration is whether the circuit court abused its discretion. *Peach*, 352 Ill. App. 3d at 694. However, in an appeal from the denial of a motion to compel arbitration without an evidentiary hearing, the standard of review is *de novo*. *Ragan v. AT&T Corp.*, 355 Ill. App. 3d 1143, 1147 (2005). In the case at bar, there was no evidentiary hearing. Accordingly, we shall review *de novo* the trial judge's ruling. This court may affirm the judgment of a trial court on any basis warranted by the record. *Evans v. Lima Lima Flight Team, Inc.*, 373 Ill. App. 3d 407, 418 (2007).

## DISCUSSION

On appeal, the defendant contends the trial court erred because (1) the Federal Arbitration Act is preemptive, (2) the agreements involved interstate commerce, (3) the agreements are supported by mutual promises, and (4) the agreements require the arbitration of the wrongful death action. To understand the defendant's preemption argument, we must examine both what the defendant does contend on appeal and what the defendant does not contend on appeal. We begin with the latter. Nowhere in its opening brief or reply brief, and at no time during oral argument, has the defendant contended that a violation of public policy is not a legitimate generally applicable defense to all contracts in Illinois. Accord-

ingly, the defendant has waived the consideration of any argument on that issue. See 210 Ill. 2d R. 341(h)(7) (the argument section of the opening brief of the appellant must include, *inter alia*, "the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on"; points not argued in the opening brief "are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing"); *Southwestern Illinois Development Authority v. Vollman*, 235 Ill. App. 3d 32, 38 (1992) (a reviewing court is entitled to have the issues clearly defined; it may deem waived issues not sufficiently or properly presented). Moreover, even if the defendant had not waived this issue, there is voluminous case law in Illinois holding that a violation of public policy can be a legitimate generally applicable defense to all contracts in Illinois. *E.g.*, *O'Hara v. Ahlgren, Blumenfeld & Kempster*, 127 Ill. 2d 333, 341-42 (1989); *Kleinwort Benson North America, Inc. v. Quantum Financial Services, Inc.*, 181 Ill. 2d 214, 226-27 (1998). Likewise, nowhere in its opening brief or reply brief, and at no time during oral argument, has the defendant contended that the protections found in sections 3-606 and 3-607 of the Nursing Home Care Act (210 ILCS 45/3-606, 3-607 (West 2006))—which, we note, were first implemented in 1980, long before arbitration agreements were as prevalent as they are today—are not "emphatically stated public policy." Accordingly, the defendant has waived the consideration of any argument on that issue. See 210 Ill. 2d R. 341(h)(7) (the argument section of the opening brief of the appellant must include, *inter alia*, "the contentions of the appellant and the reasons therefor, with citation of the authorities and the

pages of the record relied on"; points not argued in the opening brief "are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing"); *Southwestern Illinois Development Authority v. Vollman*, 235 Ill. App. 3d 32, 38 (1992) (a reviewing court is entitled to have the issues clearly defined; it may deem waived issues not sufficiently or properly presented).

We turn now to the preemption issue the defendant has sufficiently and properly presented on appeal. Notwithstanding the facts that a violation of public policy can be a legitimate generally applicable defense to all contracts in Illinois and that the protections found in sections 3-606 and 3-607 of the Nursing Home Care Act (210 ILCS 45/3-606, 3-607 (West 2006)) represent "emphatically stated public policy" that has existed in this state for nearly 30 years, the defendant contends that in this particular case the state law contract defense of a violation of public policy is preempted by the Federal Arbitration Act because the public policy expressed in sections 3-606 and 3-607 is not applicable to all contracts but is used to "specifically target arbitration agreements." In support of this argument, the defendant points to the pronouncement of the United States Supreme Court in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 685, 134 L. Ed. 2d 902, 907, 116 S. Ct. 1652, 1655 (1996) (quoting *Perry v. Thomas*, 482 U.S. 483, 492 n.9, 96 L. Ed. 2d 426, 437 n.9, 107 S. Ct. 2520, 2527 n.9 (1987) (emphasis in original)), that state law is applicable and is not preempted by the Federal Arbitration Act "'*if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally,'" but that a "'state-

law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with'" the text of the Federal Arbitration Act.

To understand the nexus between the rule stated in *Casarotto* and *Thomas*, which this court agrees is absolutely correct, and sections 3-606 and 3-607 of the Nursing Home Care Act, we must examine the latter sections in detail. Section 3-606 states, in its entirety, the following:

> "Any waiver by a resident or his legal representative of the right to commence an action under Sections 3-601 through 3-607, whether oral or in writing, shall be null and void, and without legal force or effect." 210 ILCS 45/3-606 (West 2006).

Section 3-607 states, in its entirety, the following:

> "Any party to an action brought under Sections 3-601 through 3-607 shall be entitled to a trial by jury and any waiver of the right to a trial by a jury, whether oral or in writing, prior to the commencement of an action, shall be null and void, and without legal force or effect." 210 ILCS 45/3-607 (West 2006).

Although the defendant attempts to invoke the rule in *Casarotto* and *Thomas* by claiming that the above-quoted language of sections 3-606 and 3-607 is used to "specifically target arbitration agreements," we do not agree with such a narrow reading of the language. First, neither section 3-606 nor section 3-607 mentions arbitration agreements at all, nor by their terms are they limited to those agreements. The sections, by their explicit terms, apply equally to all

contracts attempting to restrict the right of nursing home residents to "commence an action" pursuant to the Nursing Home Care Act or to waive the right to a trial by a jury in an action commenced pursuant to the Nursing Home Care Act, regardless of whether the contract involves arbitration. Accordingly, a contract that never mentions arbitration but instead requires a bench trial, or some other form of alternative dispute resolution, rather than a trial by a jury, would be voided by the sections to the same extent as a contract containing an arbitration agreement. Second, to the extent that the sections may void agreements calling for arbitration, this is an incidental, tangential effect of the sections, not their primary purpose, and so the sections can hardly be said to "specifically target arbitration agreements." To the contrary, the sections apply to all contracts involving nursing home residents, not merely to contracts invoking arbitration. Accordingly, the rule stated in *Casarotto* and *Thomas* that state law is applicable and is not preempted by the Federal Arbitration Act if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally (see *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 685, 134 L. Ed. 2d 902, 907, 116 S. Ct. 1652, 1655 (1996) (quoting *Perry v. Thomas*, 482 U.S. 483, 492 n.9, 96 L. Ed. 2d 426, 437 n.9, 107 S. Ct. 2520, 2527 n.9 (1987)) supports the position of the plaintiff, not of the defendant. Although it is certainly true that if the Nursing Home Care Act expressly directed its prohibitions only at arbitration agreements it would, as the defendant contends, run afoul of the Federal Arbitration Act, the Nursing Home Care Act does no such thing. Applying the *Casarotto* and *Thomas* rule to the facts in this case,

we conclude that because the public policy expressed in sections 3-606 and 3-607 concerns the validity, revocability, and enforceability of contracts generally and does not specifically target arbitration agreements, it presents a legitimate state law contract defense of a violation of public policy to the agreements and so voids the agreements. See also *Kinkel v. Cingular Wireless LLC*, 223 Ill. 2d 1, 15-19 (2006).

Although the trial judge limited his preemption analysis to the survival action, denying the defendant's motion on the wrongful death action on different grounds, we conclude that the foregoing analysis applies equally to both counts of the plaintiff's complaint and precludes the enforcement of the agreements with regard to the plaintiff's entire complaint. Accordingly, our conclusion that the trial judge did not err when he found that the Federal Arbitration Act did not preempt the generally applicable state law contract defense of public policy, and thus that the agreements were void as against the public policy of this state, renders it unnecessary for us to consider the defendant's arguments with regard to the alternative bases on which the trial court denied the defendant's motion: a lack of mutuality, a lack of interstate commerce, and no requirement that a plaintiff bringing a wrongful death claim on behalf of an estate proceed according to the agreements. See *Evans v. Lima Lima Flight Team, Inc.*, 373 Ill. App. 3d 407, 418 (2007) (the appellate court may affirm the judgment of a trial court on any basis warranted by the record).

## CONCLUSION

For the foregoing reasons, the circuit court's order denying the defendant's motion to compel arbitration is affirmed.

Affirmed.

STEWART, P.J., and GOLDENHERSH, J., concur.

## APPENDIX B

IN THE CIRCUIT COURT FOR THE
FOURTH JUDICIAL CIRCUIT
MARION COUNTY, ILLINOIS

| | | |
|---|---|---|
| SUE CARTER, Special Administrator, In Re The Estate of JOYCE GOTT, Deceased, | ) | FILED CLERK OF THE CIRCUIT COURT |
| Plaintiff, | ) | JUN 20 2007 |
| vs. | ) | Ronda Yates MARION COUNTY SALEM ILLINOIS |
| SSC ODIN OPERATING COMPANY, LLC d/b/a ODIN HEALTHCARE CENTER, | ) | No. 06-L-75 |
| Defendant. | ) | |

Order on Motion to Compel Arbitration

1. Concerning Count II this Court believes that *Varelis* 167 Ill 2 449 provides significant insight into the answer of the question of statutory interpretation presented by defendant. Yes, wrongful death is a statutory right appropriately limited by the legislature. Although attorneys generally refer to wrongful death actions as non-derivative, they are derivative in the sense that the ability to bring the wrongful death action is conditioned on the deceased having "had a right of action against the same person or

persons for injuries sustained." *Biddy* 374 Ill at 513-14.

The examples in *Varelis* are indeed illustrative and confirm this Court's interpretation that the legislature would consider the right to proceed to recovery via arbitration as being a right of action. We have the same defendants and the same injuries. The statutory cause of action is even the same. Only the forum is different. Perhaps the deceased would have to proceed via arbitration, but she still had a cause of action. This Court will not make the requested leap in logic suggested by defendant that deceased claim perhaps being required to be presented through arbitration, requires current plaintiffs to do the same.

2. Concerning Count I this Court believes that the series of cases presented by both plaintiff and defendant establish that state contract defenses that avoid the effect of the contract remain a defense to the enforcement of FAA application. Although not essential to this examination, it assists this Court's understanding to observe that the affirmative defenses to the contract are available. This seems all too obvious that an unenforceable contract with FAA language avoids preemption of the ancillary claims.

The underlying contract is unenforceable both because it is in direct violation of emphatically state public policy and for lack of mutuality.

3. Defendant boldly suggests that even if Illinois law requires the voiding of the arbitration agreement for violation of public policy that "FAA preempts any contrary state law that prohibits or restricts arbitration." (memorandum filed March 5, 2007 p. 5). This

issue, this Court believes, is avoided if the underlying contract is unenforceable via state laws which is provided for by FAA's language.

Further, the underlying contractual relationship was between an elderly Marion County resident and a Marion County care facility. The contract was for personal care within this county. The action relates to the care provided. The state statute involved here is a public safety statute that affects the relationships between the contracting parties. This trial count believes that in the aggregate the economic activity does not represent general practice subject to federal control.

MOTION DENIED

6/20/07 s/David L. Sauer

## APPENDIX C

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(207) 782-2035

September 24, 2008

Mr. W. Jeffrey Muskopf
Lashly & Baer, P.C.
714 Locust Street
St. Louis, MO 63101-1699

No. 106511 – Sue Carter, Special Adm'r, etc., respondent, v. SSC Odin Operating Company, LLC, etc., petitioner. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 29, 2008.

## APPENDIX D

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 9, Clause 3 of the United States Constitution (the Commerce Clause) provides, in pertinent part:

The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

2. Article VI, Clause 2 of the United States Constitution (the Supremacy Clause) provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

3. Sections 1 and 2 of the Federal Arbitration Act, 9 U.S.C. §§ 1-2, provide:

**§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title**

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined,

means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

**§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate**

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

4. The Illinois Nursing Home Care Act, Chapter 210, Act 45, Article III, Part 6 of the Illinois Compiled Statutes, provides, in pertinent part:

**45/3-601. Liability to residents**

§ 3-601. The owner and licensee are liable to a resident for any intentional or negligent act or omission of their agents or employees which injures the resident.

**45/3-602. Actual damages; costs and attorney's fees**

§ 3-602. The licensee shall pay the actual damages and costs and attorney's fees to a facility resident whose rights, as specified in Part 1 of Article II of this Act, are violated.

**45/3-603. Actions; injunctive and declaratory relief**

§ 3-603. A resident may maintain an action under this Act for any other type of relief, including injunctive and declaratory relief, permitted by law.

**45/3-604. Class actions**

§ 3-604. Any damages recoverable under Sections 3-601 through 3-607, including minimum damages as provided by these Sections, may be recovered in any action which a court may authorize to be brought as a class action pursuant to the Civil Practice Law. The remedies provided in Sections 3-601 through 3-607, are in addition to and cumulative with any other legal remedies available to a resident. Exhaustion of any available administrative remedies shall not be required prior to commencement of suit hereunder.

**45/3-605. Medical assistance; exemption of damages recovered**

§ 3-605. The amount of damages recovered by a resident in an action brought under Sections 3-601 through 3-607 shall be exempt for purposes of determining initial or continuing eligibility for medical assistance under "The Illinois Public Aid Code", as now or hereafter amended, and shall neither be taken into consideration nor required to be applied toward

the payment or partial payment of the cost of medical care or services available under "The Illinois Public Aid Code".

**45/3-606. Waiver of right to sue**

§ 3-606. Any waiver by a resident or his legal representative of the right to commence an action under Sections 3-601 through 3-607, whether oral or in writing, shall be null and void, and without legal force or effect.

**45/3-607. Jury trial; waivers**

§ 3-607. Any party to an action brought under Sections 3-601 through 3-607 shall be entitled to a trial by jury and any waiver of the right to a trial by a jury, whether oral or in writing, prior to the commencement of an action, shall be null and void, and without legal force or effect.

* * * * *

## APPENDIX E

[ARBITRATION AGREEMENT DATED MAY 20, 2005]

### HEALTH CARE ARBITRATION AGREEMENT
### *PLEASE READ CAREFULLY*

### I. EXPLANATION

Under federal law two or more parties may agree in writing for the settlement by arbitration of any dispute arising between them. Arbitration is a method for resolving disputes without involving the courts. It is frequently faster and less expensive than using the court system. In these arbitration proceedings, the dispute is heard by private individuals, called arbitrators, who are selected by the Resident and/or the Resident's Legal Representative and the Facility. The decision of the arbitrators binds both parties and are [sic] final. By agreeing to binding arbitration, both parties waive the right to trial before a judge or jury.

### II. AGREEMENT

The following is an agreement to arbitrate any dispute that might arise between Joyce Gott ("Resident") and/or Sue Carter ("Legal Representative") and Odin Healthcare ("Facility") ("Facility" includes the particular facility where the Resident resides, its parents, affiliates, and subsidiary companies, owners, officers, directors, medical directors, employees, successors, assigns, agents, attorney[s] and insurers). The parties expressly agree and voluntarily enter into this binding Health Care Arbitration Agreement (the "Agreement"). The Resident and the Facility have entered into an Admission

Agreement and acknowledge that such Admission Agreement constitutes the foundation of the relationship between them and all duties and obligations arising between them. The Resident and the Facility further acknowledge that said Admission Agreement evidences a transaction involving interstate commerce. The Resident and the Facility understand that the Admission Agreement involves interstate commerce because the Facility is affiliated with Mariner Health Care, Inc., which is a foreign corporation with a nationwide network of over 250 nursing facilities, all of which are fully engaged in interstate commerce by activity that includes, but is not limited to, execution of interstate contracts relating to services, management and interstate marketing, acceptance of federal funds as a significant source of income, regulation by federal statutes and the use of goods, services, employees and management personnel in multiple states. This Agreement shall not apply to any dispute where the amount in controversy is less than two hundred thousand ($200,000.00) dollars.

In consideration of this binding Agreement, the Facility and the Resident acknowledge that they are agreeing to a mutual arbitration, regardless of which party is making a claim; that the Facility agrees to pay the fees of the arbitrators and up to $5,000.00 of reasonable and appropriate attorney's fees and costs for the Resident in any claims against the Facility; that the Resident shall have the right to choose the location of any arbitration under this Agreement; that the parties will mutually benefit from the speedy and efficient resolution of disputes which arbitration is expected to provide; and other good and

valuable consideration, the receipt and sufficiency of which is hereby acknowledged by all parties hereto. Intending to be legally bound, the parties expressly agree that this Agreement will be governed by the Federal Arbitration Act, 9 U.S.C. §[§] 1-16 ("FAA"). It is the express intent of the parties to have a binding arbitration agreement and the parties further agree as follows:

The parties agree that they shall submit to binding arbitration all disputes against each other and their representatives, affiliates, governing bodies, agents and employees arising out of or in any way related or connected to the Admission Agreement and all matters related thereto including matters involving the Resident's stay and care provided at the Facility, including but not limited to any disputes concerning alleged personal injury to the Resident caused by improper or inadequate care including allegations of medical malpractice; any disputes concerning whether any statutory provisions relating to the Resident's rights under Illinois law were violated; any disputes relating to the payment or nonpayment for the Resident's care and stay at the Facility; and any other dispute under state or Federal law based on contract, tort, statute (including any deceptive trade practices and consumer protection statutes), warranty or any alleged breach, default, negligence, wantonness, fraud, misrepresentation or suppression of fact or inducement.

An arbitration hearing regarding any disputes shall be held before a board of three arbitrators (selected from a nationally recognized arbitration association), one chosen by each side in the dispute with the third to be chosen by the two arbitrators previ-

ously chosen. Such hearing and all other proceedings relative to the arbitration of the claim(s) shall be conducted in accordance with the applicable rules of procedure governing the selected arbitrators that do not conflict with the FAA. In rendering a decision on the merits of the claim(s), the arbitrators shall apply the substantive law of the State of Illinois.

Each party may be represented by counsel in connection with all arbitration proceedings and each party agrees to bear their own attorney fees and costs, except as expressly provided for above. Any other fees and costs associated with these arbitration proceedings shall be determined by the panel of arbitrators. In the event that any party to this Agreement refuses to go forward with arbitration, the party compelling arbitration reserves the right to proceed with arbitration, and the Resident and the Facility specifically acknowledge the applicability of the FAA allowing the aggrieved party to petition an appropriate court for enforcement of the arbitration agreement and to obtain a stay of any other proceeding. Submission of any dispute under this Agreement to arbitration may only be avoided as specifically allowed by the FAA. To the extent permitted by applicable law, any party to this Agreement who refuses to go forward with arbitration hereby acknowledges that the arbitrator will go forward with the arbitration hearing and render a binding decision without the participation of the party opposing arbitration or despite their absence at the arbitration hearing.

It is the intention of the Facility and the Resident that this Agreement shall inure to the benefit of and bind the Facility, its parents, affiliates, and subsidi-

ary companies, owners, officers, representatives, directors, medical directors, employees, successors, assigns, agents, attorneys and insurers; the Resident, his/her successors, assigns, agents, attorneys, insurers, heirs, trustees, and representatives, including the personal representative or executor of his or her estate; and the Legal Representative, his/her successors, assigns, agents, attorneys, insurers, heirs, trustees, and representatives or executor of his or her estate.

In the event that any portion of the Agreement will be determined to be invalid or unenforceable, the remainder of this Agreement will be deemed to continue to be binding upon the parties hereto in the same manner as if the invalid or unenforceable provision were not a part of the Agreement.

## III. ACKNOWLEDGEMENTS

The execution of this Agreement is not a precondition to receiving medical treatment or for admission to the Facility.

The Resident/Legal Representative acknowledges that the Resident has been admitted to the Facility to receive care and services as of 5/20/05.

The Resident and/or Legal Representative understand(s) that he/she has the right to consult with an attorney of his/her choice, prior to signing this agreement, to receive explanations or clarification or any of the terms of this Agreement.

The Resident and/or Legal Representative understand(s), agree(s) to, and has received a copy of this Agreement, and acknowledges that the terms have been explained to him/her, or his/her designee, by a

representative of the Facility, and that he/she has had an opportunity to ask questions about this Agreement.

Each party agrees to waive the right to a trial, before a judge or jury, for all disputes, including those at law or in equity, subject to binding arbitration under this Agreement.

The Resident and/or Legal Representative understand(s) that this agreement may be rescinded by giving written notice to the Facility within 30 days of signature. If not rescinded within 30 days of signature, this Agreement shall remain in effect for all claims arising out of the Resident's stay at the Facility. This Agreement will continue to be valid for any stay at this Facility by this Resident, even when the Resident has been discharged and later readmitted. If the act(s) underlying the dispute is committed prior to the revocation date, this Agreement shall be binding with respect to said act or acts.

* * * * * * * * * *

AGREEMENT TO ARBITRATE HEALTH CARE NEGLIGENCE CLAIMS

NOTICE TO PATIENT

YOU CANNOT BE REQUIRED TO SIGN THIS AGREEMENT IN ORDER TO RECEIVE TREATMENT. BY SIGNING THIS AGREEMENT, YOUR RIGHT TO TRIAL BY A JURY OR A JUDGE IN A COURT WILL BE BARRED AS TO ANY DISPUTE RELATING TO INJURIES THAT MAY RESULT FROM NEGLIGENCE DURING YOUR TREATMENT OR CARE, AND WILL BE REPLACED BY AN ARBITRATION PROCEDURE.

THIS AGREEMENT PROVIDES THAT ANY CLAIMS WHICH MAY ARISE OUT OF YOUR HEALTH CARE WILL BE SUBMITTED TO A PANEL OF ARBITRATORS, RATHER THAN TO A COURT FOR DETERMINATION. THIS AGREEMENT REQUIRES ALL PARTIES SIGNING IT TO ABIDE BY THE DECISION OF THE ARBITRATION PANEL.

_____

Signature of Resident/Date

s/Sue Carter 5/20/05

Signature of Legal Representative/Date
(if signing on behalf of Resident)

_____

Signature of Legal Representative/Date
(if signing on his or her own behalf)

s/Vicki Johnson SSD 5/20/05

Signature of Facility Representative/Date

## APPENDIX F

[ARBITRATION AGREEMENT DATED JANUARY 18, 2006]

### HEALTH CARE ARBITRATION AGREEMENT
***PLEASE READ CAREFULLY***

### I. EXPLANATION

Under federal law two or more parties may agree in writing for the settlement by arbitration of any dispute arising between them. Arbitration is a method for resolving disputes without involving the courts. It is frequently faster and less expensive than using the court system. In these arbitration proceedings, the dispute is heard by private individuals, called arbitrators, who are selected by the Resident and/or the Resident's Legal Representative and the Facility. The decision of the arbitrators binds both parties and are [sic] final. By agreeing to binding arbitration, both parties waive the right to trial before a judge or jury.

### II. AGREEMENT

The following is an agreement to arbitrate any dispute that might arise between Joyce Gott ("Resident") and/or _____ ("Legal Representative") and Odin Healthcare ("Facility") ("Facility" includes the particular facility where the Resident resides, its parents, affiliates, and subsidiary companies, owners, officers, directors, medical directors, employees, successors, assigns, agents, attorney[s] and insurers). The parties expressly agree and voluntarily enter into this binding Health Care Arbitration Agreement (the "Agreement"). The Resident and the Facility have entered into an Admission

Agreement and acknowledge that such Admission Agreement constitutes the foundation of the relationship between them and all duties and obligations arising between them. The Resident and the Facility further acknowledge that said Admission Agreement evidences a transaction involving interstate commerce. The Resident and the Facility understand that the Admission Agreement involves interstate commerce because the Facility is affiliated with Mariner Health Care, Inc., which is a foreign corporation with a nationwide network of over 250 nursing facilities, all of which are fully engaged in interstate commerce by activity that includes, but is not limited to, execution of interstate contracts relating to services, management and interstate marketing, acceptance of federal funds as a significant source of income, regulation by federal statutes and the use of goods, services, employees and management personnel in multiple states. This Agreement shall not apply to any dispute where the amount in controversy is less than two hundred thousand ($200,000.00) dollars.

In consideration of this binding Agreement, the Facility and the Resident acknowledge that they are agreeing to a mutual arbitration, regardless of which party is making a claim; that the Facility agrees to pay the fees of the arbitrators and up to $5,000.00 of reasonable and appropriate attorney's fees and costs for the Resident in any claims against the Facility; that the Resident shall have the right to choose the location of any arbitration under this Agreement; that the parties will mutually benefit from the speedy and efficient resolution of disputes which arbitration is expected to provide; and other good and

valuable consideration, the receipt and sufficiency of which is hereby acknowledged by all parties hereto. Intending to be legally bound, the parties expressly agree that this Agreement will be governed by the Federal Arbitration Act, 9 U.S.C. §[§] 1-16 ("FAA"). It is the express intent of the parties to have a binding arbitration agreement and the parties further agree as follows:

The parties agree that they shall submit to binding arbitration all disputes against each other and their representatives, affiliates, governing bodies, agents and employees arising out of or in any way related or connected to the Admission Agreement and all matters related thereto including matters involving the Resident's stay and care provided at the Facility, including but not limited to any disputes concerning alleged personal injury to the Resident caused by improper or inadequate care including allegations of medical malpractice; any disputes concerning whether any statutory provisions relating to the Resident's rights under Illinois law were violated; any disputes relating to the payment or nonpayment for the Resident's care and stay at the Facility; and any other dispute under state or Federal law based on contract, tort, statute (including any deceptive trade practices and consumer protection statutes), warranty or any alleged breach, default, negligence, wantonness, fraud, misrepresentation or suppression of fact or inducement.

An arbitration hearing regarding any disputes shall be held before a board of three arbitrators (selected from a nationally recognized arbitration association), one chosen by each side in the dispute with the third to be chosen by the two arbitrators previ-

ously chosen. Such hearing and all other proceedings relative to the arbitration of the claim(s) shall be conducted in accordance with the applicable rules of procedure governing the selected arbitrators that do not conflict with the FAA. In rendering a decision on the merits of the claim(s), the arbitrators shall apply the substantive law of the State of Illinois.

Each party may be represented by counsel in connection with all arbitration proceedings and each party agrees to bear their own attorney fees and costs, except as expressly provided for above. Any other fees and costs associated with these arbitration proceedings shall be determined by the panel of arbitrators. In the event that any party to this Agreement refuses to go forward with arbitration, the party compelling arbitration reserves the right to proceed with arbitration, and the Resident and the Facility specifically acknowledge the applicability of the FAA allowing the aggrieved party to petition an appropriate court for enforcement of the arbitration agreement and to obtain a stay of any other proceeding. Submission of any dispute under this Agreement to arbitration may only be avoided as specifically allowed by the FAA. To the extent permitted by applicable law, any party to this Agreement who refuses to go forward with arbitration hereby acknowledges that the arbitrator will go forward with the arbitration hearing and render a binding decision without the participation of the party opposing arbitration or despite their absence at the arbitration hearing.

It is the intention of the Facility and the Resident that this Agreement shall inure to the benefit of and bind the Facility, its parents, affiliates, and subsidi-

ary companies, owners, officers, representatives, directors, medical directors, employees, successors, assigns, agents, attorneys and insurers; the Resident, his/her successors, assigns, agents, attorneys, insurers, heirs, trustees, and representatives, including the personal representative or executor of his or her estate; and the Legal Representative, his/her successors, assigns, agents, attorneys, insurers, heirs, trustees, and representatives or executor of his or her estate.

In the event that any portion of the Agreement will be determined to be invalid or unenforceable, the remainder of this Agreement will be deemed to continue to be binding upon the parties hereto in the same manner as if the invalid or unenforceable provision were not a part of the Agreement.

## III. ACKNOWLEDGEMENTS

The execution of this Agreement is not a precondition to receiving medical treatment or for admission to the Facility.

The Resident/Legal Representative acknowledges that the Resident has been admitted to the Facility to receive care and services as of 1-12-06.

The Resident and/or Legal Representative understand(s) that he/she has the right to consult with an attorney of his/her choice, prior to signing this agreement, to receive explanations or clarification or any of the terms of this Agreement.

The Resident and/or Legal Representative understand(s), agree(s) to, and has received a copy of this Agreement, and acknowledges that the terms have been explained to him/her, or his/her designee, by a

representative of the Facility, and that he/she has had an opportunity to ask questions about this Agreement.

Each party agrees to waive the right to a trial, before a judge or jury, for all disputes, including those at law or in equity, subject to binding arbitration under this Agreement.

The Resident and/or Legal Representative understand(s) that this agreement may be rescinded by giving written notice to the Facility within 30 days of signature. If not rescinded within 30 days of signature, this Agreement shall remain in effect for all claims arising out of the Resident's stay at the Facility. This Agreement will continue to be valid for any stay at this Facility by this Resident, even when the Resident has been discharged and later readmitted. If the act(s) underlying the dispute is committed prior to the revocation date, this Agreement shall be binding with respect to said act or acts.

* * * * * * * * * *

AGREEMENT TO ARBITRATE HEALTH CARE NEGLIGENCE CLAIMS

NOTICE TO PATIENT

YOU CANNOT BE REQUIRED TO SIGN THIS AGREEMENT IN ORDER TO RECEIVE TREATMENT. BY SIGNING THIS AGREEMENT, YOUR RIGHT TO TRIAL BY A JURY OR A JUDGE IN A COURT WILL BE BARRED AS TO ANY DISPUTE RELATING TO INJURIES THAT MAY RESULT FROM NEGLIGENCE DURING YOUR TREATMENT OR CARE, AND WILL BE REPLACED BY AN ARBITRATION PROCEDURE.

THIS AGREEMENT PROVIDES THAT ANY CLAIMS WHICH MAY ARISE OUT OF YOUR HEALTH CARE WILL BE SUBMITTED TO A PANEL OF ARBITRATORS, RATHER THAN TO A COURT FOR DETERMINATION. THIS AGREEMENT REQUIRES ALL PARTIES SIGNING IT TO ABIDE BY THE DECISION OF THE ARBITRATION PANEL.

s/Joyce Gott 1-18-06
Signature of Resident/Date

_____
Signature of Legal Representative/Date
(if signing on behalf of Resident)

_____
Signature of Legal Representative/Date
(if signing on his or her own behalf)

s/[illegible] 1-18-06
Signature of Facility Representative/Date

## APPENDIX G

IN THE CIRCUIT COURT FOR THE
FOURTH JUDICIAL CIRCUIT
MARION COUNTY, ILLINOIS

| | | |
|---|---|---|
| SUE CARTER, Special Administrator, In Re The ESTATE OF JOYCE GOTT, Deceased, | ) | FILED CLERK OF THE CIRCUIT COURT |
| Plaintiff, | ) | NOV 22 2006 |
| vs. | ) | Ronda Yates MARION COUNTY SALEM ILLINOIS |
| SSC ODIN OPERATING COMPANY, LLC d/b/a ODIN HEALTHCARE CENTER, | ) | NO. 06-L-75 |
| Defendant. | ) | |

**COMPLAINT**

**COUNT I**
**(STATUTORY ACTION-**
**NURSING HOME CARE ACT)**

Comes now plaintiff, SUE CARTER, Special Administrator of the ESTATE OF JOYCE GOTT, Deceased, by and through her attorneys, Staci M. Yandle and The Rex Carr Law Firm, and for her cause of action against defendant, SSC ODIN OPERATING COMPANY LLC d/b/a ODIN HEALTHCARE CENTER, states as follows:

1. SUE CARTER is the duly-appointed Special Administrator of the Estate of Joyce Gott, who died January 31, 2006. She has been appointed Special Administrator by the Circuit Court for the Fourth Judicial Circuit, Marion County, Illinois.

2. At all times relevant herein, JOYCE GOTT, Deceased, was a resident of ODIN HEALTHCARE CENTER, Odin, Marion County, Illinois.

3. At all times relevant herein, defendant, SSC ODIN OPERATING COMPANY LLC d/b/a ODIN HEALTHCARE CENTER, was a limited liability company which operated a long-term nursing care facility known as ODIN HEALTHCARE CENTER, and which held itself out to the public as a nursing and rehabilitation center which provides nursing care for aging persons.

4. At all times relevant herein, there was in full force and effect, a statute known as "The Nursing Home Care Act", as amended (The "Act"), 210 ILCS 45/1-101 et. [sic] seq. and the facility operated by SSC ODIN OPERATING COMPANY LLC was a "facility" as defined by 45/1-113 of the Act and was subject to the requirements of the Act and the regulations of the Illinois Department of Public Health promulgated pursuant to the Act.

5. At all times relevant herein, the facility, received payment from Medicare to provide JOYCE GOTT nursing home care, treatment and related services, and was subject to the requirements of 42 USC Section 1396r (1990) et. [sic] seq., as amended by the Omnibus Budget Reconciliation Act of 1987 ("OBRA") and Volume 42, Code of Federal Regulations, Part 483 setting forth Medicare and Medicaid

requirements for long-term facilities ("OBRA Regulations"), as effective on October 1, 1990.

6. At all times relevant herein, the facility operated by defendant was a "nursing facility" as defined by 42 USC, Section 1396r.

7. Throughout the time JOYCE GOTT was a resident of the facility, defendant was the licensee of the facility.

8. The defendant, through its agents, servants and employees, had a duty not to violate the rights of any resident of the facility including the duty not to neglect any resident as provided by 210 ILCS 45/2-107 and 210 ILCS 45/1-117.

9. Notwithstanding the aforementioned duty, the defendant, by and through its agents, servants and employees and during the period between January 12, 2006 through January 31, 2006, violated the Act as follows:

a. In violation of 77 Ill. Admin. Code, Ch. I, Section 300.1210(a), failed to provide adequate and properly supervised care as needed by JOYCE GOTT in that it failed to conduct INR testing on JOYCE GOTT who was receiving anti-coagulant therapy;

b. In violation of Section 483.75(b) of the OBRA Regulations, failed to operate its facility and provide services in compliance with all applicable federal, state, local laws, regulations and codes and within accepted professional standards and principles that apply to professionals providing serves in such facility.

10. As a direct and proximate result of one or more of defendant's statutory violations, JOYCE GOTT sustained injuries including, but not limited to gastrointestinal bleeding, anemia and respiratory failure.

11. As a further direct and proximate result of one or more of defendant's statutory violations, JOYCE GOTT suffered pain and suffering, emotional distress and mental anguish between January 12, 2006 through January 31, 2006.

12. This is a survivorship action brought pursuant to 755 ILCS 5/27-6 for JOYCE GOTT's personal injuries sustained prior to her death as a result of defendant's statutory violations.

WHEREFORE, plaintiff, SUE CARTER, Special Administrator of the Estate of JOYCE GOTT, deceased, demands judgment against defendant, SSC ODIN OPERATING COMPANY, LLC d/b/a ODIN HEALTHCARE CENTER, in an amount in excess of $50,000.00, attorneys fees and costs as provided for by statute.

**PLAINTIFF DEMANDS A TRIAL BY JURY.**

**COUNT II**

**(WRONGFUL DEATH)**

Comes now plaintiff, SUE CARTER, Special Administrator of the Estate of JOYCE GOTT, Deceased, by and through her attorneys, Staci M. Yandle and The Rex Carr Law Firm, and for her cause of action against defendant, SSC ODIN OPERATING COMPANY, LLC d/b/a ODIN HEALTHCARE CENTER, states as follows:

1 - 3. Plaintiff repeats and re-allege [sic] the allegations contained in Paragraphs 1 though 3 of Count I as Paragraphs 1 - 3 of Count II.

4. In providing nursing home services to JOYCE GOTT, defendant, through its agents, servants and employees, had a duty to exercise ordinary care in the provision of care and treatment to JOYCE GOTT.

5. Notwithstanding the aforementioned duty, defendant, by and through its agents, servants and employees and during the period January 12, 2006 through January 31, 2006, was guilty of one or more of the following negligent acts or omissions:

a. Negligently and carelessly failed to provide adequate and properly supervised care as needed by JOYCE GOTT in that it failed to conduct INR testing on JOYCE GOTT who was on anti-coagulant therapy;

b. Negligently and carelessly failed to operate its facility and provide services in compliance with all applicable federal, state, local laws, regulations and codes and within accepted professional standards and principles that apply to professionals providing services in such facility.

6. As a direct and proximate result of one or more of the negligent acts or omissions of the defendant, JOYCE GOTT sustained injuries including, but not limited to, gastrointestinal bleeding, anemia and respiratory failure, all of which caused or contributed to cause her death on January 31, 2006.

7. As a further direct and proximate result of the negligence of this defendant, the heirs of JOYCE

GOTT have been deprived of her companionship and society.

WHEREFORE, plaintiff, SUE CARTER, Special Administrator of the Estate of JOYCE GOTT, Deceased, demands judgment against defendant, SSC ODIN OPERATING COMPANY, LLC d/b/a ODIN HEALTHCARE CENTER in an amount in excess of $50,000.00, plus costs of this suit.

**PLAINTIFF DEMANDS A TRIAL BY JURY.**

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(3)

No. 08-805

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In The
# Supreme Court of the United States

SSC ODIN OPERATING COMPANY LLC,
D/B/A ODIN HEALTH CARE CENTER,

*Petitioner,*

v.

SUE CARTER, SPECIAL ADMINISTRATOR
OF THE ESTATE OF JOYCE GOTT,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Fifth District**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

The Appellate Court of Illinois, Fifth District, affirmed the denial of petitioner's motion to compel arbitration. Should respondent be compelled to arbitrate one of her claims, even though no valid arbitration agreement exists between the parties?

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## INTRODUCTION

Petitioner seeks review of a decision of an intermediate state appellate court on whether unusual state statutory provisions applicable only to nursing home residents are preempted by the Federal Arbitration Act (FAA). Petitioner concedes that only two other states have comparable statutes and that no federal appellate court or state court of last resort has ruled on whether such statutes are preempted. In the absence of a conflict or of any indication that such statutes are common or that the issue presented is a frequently recurring one, Petitioner has failed to demonstrate that this case presents an issue of sufficient importance to merit this Court's review.

Moreover, Petitioner overlooks that regardless of how this Court might resolve the preemption question it seeks to present, it will still have to litigate with Respondent in court, because Respondent never entered into an arbitration agreement with Petitioner, and her lawsuit raises a claim under the Illinois Wrongful Death Act that belongs exclusively to her rather than to the Decedent who signed the arbitration agreements at issue. The lower court did not have to reach this issue because it held the arbitration agreements invalid, but if the case were remanded, it would have to address this issue and could not direct Respondent's wrongful death claim to arbitration. Thus, Petitioner's preemption argument will not keep it out of court no matter how it is resolved, and this Court should not devote its

attention to an issue that, ultimately, will have so little impact on the course of the proceedings below.

Finally, in resolving the preemption issue posed by Petitioner, the lower court conscientiously applied the relevant decisions of this Court, including *Doctor's Associates, Inc. v. Casarotto,* 517 U.S. 681 (1996) and *Perry v. Thomas*, 482 U.S. 483, 107 S. Ct. 2520 (1987) and correctly recognized that those decisions hold that the FAA permits application to arbitration of generally applicable state-law contract principles but preempts application of state-law principles that apply distinctively to arbitration agreements. Petitioner does not take issue with the lower court's statement of the principles derived from this Court's decisions, but only with their *application* to an unusual set of state statutes. Even if Petitioner's complaints about the lower court's application of FAA preemption principles were correct, error correction – especially with respect to a decision that does not necessarily reflect the final word of the Illinois courts with respect to the issue presented – is not a sufficient basis for invocation of this Court's discretionary jurisdiction.

## STATEMENT OF THE CASE

This case involves claims that Respondent Sue Carter brought pursuant to the Illinois Nursing Home Care Act (INHCA) and the Illinois Wrongful Death Act (IWDA) to recover damages resulting from

injuries sustained by and the death of Joyce Gott. Respondent alleged that the Petitioner failed to provide adequate care to Joyce Gott while Ms. Gott was a resident at Petitioner's nursing home. Joyce Gott was admitted into Odin Health Care Nursing Home on January 12, 2006 to convalesce from a surgical procedure that fixed a hip fracture. At the time of admission, Ms. Gott was on Coumadin, a blood thinner. As a result, Dr. Aziz Rahman, Ms. Gott's family doctor, provided a "Doctor's Protocol" sheet with her admission, that required the staff at Odin to test her PTINR levels **daily** for the first three days, then once a week for the three weeks after that, and then once every two weeks for three weeks following that. The purpose of the testing was to check the coagulation of the blood. Contrary to the specific instructions on the "Doctor's Protocol," Ms. Gott's PTINR was taken on January 13, 2006, and not taken again. Because Odin failed to test Ms. Gott's blood according to the protocol, they failed to detect that Ms. Gott's blood had become too thin. As a result, Ms. Gott, 75 years-old at the time, developed gastrointestinal bleeding and died on January 31, 2006.

Odin moved the trial court to compel arbitration based on two written arbitration agreements signed by or on behalf of Ms. Gott. In response to the motion, Carter raised several state-law defenses, including lack of mutuality, voidness for illegality, and that Carter is a non-party not bound by the agreements. The trial court denied the motion to compel arbitration and the Illinois Appellate Court, Fifth District,

affirmed. The Illinois Supreme Court denied Odin's petition for leave to appeal.

## REASONS FOR DENYING THE WRIT

Contrary to petitioner Odin's assertion, review by this Court is not necessary to ensure proper and uniform application of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, to determine if a claim is subject to arbitration, nor does the decision below present an irreconcilable conflict with this Court's precedents. Rather, this matter involves traditional principles of contract interpretation and, under the FAA, arbitration agreements are subject to generally applicable state law contract defenses. Moreover, regardless of any decision this Court might render with respect to the question presented by Odin, the outcome with respect to Carter's wrongful death claim would remain the same, because Carter was not a party to any arbitration agreement. That is, regardless of how this Court might resolve the pre-emption question petitioner seeks to present, it will still have to litigate with Respondent in court. This is so because the FAA "does not require parties to arbitrate when they have not agreed to do so." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985).

## I. There Is No Valid Agreement to Arbitrate Respondent's Wrongful Death Claim.

### A. The FAA Does Not Require Courts to Force Arbitration on Parties Who Have Not Agreed to Arbitrate.

The FAA places arbitration agreements on equal footing with other contracts. Contracts do not become super contracts simply because of the presence of an arbitration clause.

Nothing in the FAA overrides normal rules of contract formation; the Act's goal was to put arbitration on a par with other contracts and eliminate any vestige of old rules disfavoring arbitration. Arbitration depends on agreement, see *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 943, 115 S. Ct. 1920 (1995); *AT & T Technologies, Inc. v. Communications Workers,* 475 U.S. 643, 648-49, 106 S. Ct. 1415 (1986), and this Court has repeatedly stated that "when deciding whether the parties agreed to arbitrate a certain matter . . . courts generally should apply ordinary state-law principles that govern the formation of contracts." *First Options*, 514 U.S. at 944; see also *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 60-63 (1995); *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989) ("the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review"); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 447 (2003) (the contractual interpretation question of whether an arbitration clause permitted

class actions in arbitration was "a matter of state law. . . .")

It is axiomatic that a party to a contract cannot bargain away a right he or she does not have. Indeed, petitioner Odin does not dispute the fact that the right to bring a wrongful death claim does not belong to the decedent. Nor is there any contention that respondent Carter ever entered into any agreement to arbitrate any claim. Thus, there is no denying in this case that Carter's wrongful death claim is not subject to the arbitration agreement, and Odin does not contend otherwise. Regardless of the resolution of the preemption issues raised by the petition, therefore, Carter's wrongful death claim cannot be referred to arbitration, and the case against the nursing home will inevitably proceed in the trial court on the wrongful-death claim.

Because the court below could have reached the same outcome by denying arbitration on this ground – and would be required to address the issue and reach the same result even if the Court were to decide the preemption issue adversely and remand – this Court should deny the petition for certiorari on this independent basis.[1]

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[1] This Court recently reiterated that:

"Without cross-petitioning for certiorari, a prevailing party may, of course, 'defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered

(Continued on following page)

### B. The Illinois Court of Appeals, Fifth District, Applied Established and Routine Principles of State Contract Law.

In *Allied-Bruce Terminix Co's, Inc. v. Dobson,* 513 U.S. 265, 281 (1995), this Court reiterated that "States may regulate contracts, *including arbitration clauses*, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.'" (emphasis added). The court below applied this principle in rejecting Odin's preemption claim. First, the court made the unremarkable observation that "a violation of public policy can be a legitimate generally applicable defense to all contracts in Illinois." Pet. App. 6a (*citing O'Hara v. Ahlgren, Blumfeld and Kempster*, 127 Ill. 2d 333, 314-42 (1989); *Kleinwort Benson North America, Inc. v. Quantum Financial Services, Inc.*, 181 Ill. 2d 214, 226-27 (1998).

Next, the Illinois Court of Appeals observed that, unlike the statute at issue in *Doctor's Associates, Inc. v. Casarotto,* 517 U.S. 681, 687 (1996), the Illinois Nursing Home Care Act (INHCA) (210 Ill. Comp.

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by the District Court or the Court of Appeals.'" *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38-39, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989) (quoting *Washington v. Confederated Bands and Tribes of Yakima Nation*, 439 U.S. 463, 476, n. 20, 99 S. Ct. 740, 58 L.Ed.2d 740 (1979)).

*14 Penn Plaza v. Pyett*, ___ S. Ct. ___, 2009 WL 838159 at *15.

Stat. 45/3-606 and 3-607, "represent[s] 'emphatically stated public policy' that has existed in this state for nearly 30 years." Pet. App. 7a. The Illinois Appellate Court correctly stated that:

> The rule stated in *Casarotto* and [*Perry v.*] *Thomas*[, 482 U.S. 483 (1987),] [is] that state law is applicable and is not preempted by the Federal Arbitration Act if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.

Pet. App. 9a. The Illinois Appellate Court then applied the rule as stated in *Casarotto* and *Thomas* to the facts of this case and concluded that:

> because the public policy expressed in sections 3-606 and 3-607 concerns the validity, revocability and enforceability of contracts generally and does not specifically target arbitration agreements, it presents a legitimate state law contract defense of a violation of public policy to the agreements and so voids the agreements.

Pet. App. 10a (citing *Kinkel v. Cingular Wireless LLC*, 223 Ill. 2d 1, 15-19 (2009)). The reasoning of the Illinois Appellate Court is consistent with this Court's express holding in *Casarotto* that "[c]ourts may not . . . invalidate arbitration agreements under state laws applicable only to arbitration provisions." 517 U.S. at 686. Thus, despite the "liberal federal policy favoring arbitration agreements," *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 81 (2000),

state law is not entirely displaced from the FAA preemption analysis. Under § 2, "state law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Thomas*, 482 U.S. at 492 n. 9 (1987). In other words, in enacting the FAA "Congress [only] precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'" *Id.* (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)). In short, the Illinois Appellate Court's ruling is consistent with this Court's precedents.

It is also well established that state law governs the enforceability of contracts, so long as the state law does not disfavor arbitration clauses as compared to other contract terms. Here, Odin has not shown, and cannot show, a conflict or a "state of confusion" about either these broad principles or their application to this case. Indeed, Odin's claim is, at most, that the court below misapplied correctly stated legal principles to the particular Illinois statutes involved in this case. Even if Odin was correct, such a claimed error by an intermediate-level state appellate court hardly warrants review by this Court. Indeed, this Court's Rule 10 specifically admonishes that "[a] petition for certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."

## II. There Is No Split in Authority on the Questions Presented in the Petition.

In an effort to dress up its request for review of the correctness of the lower court's decision as an issue meriting this Court's attention, petitioner Odin claims that the decision conflicts with a number of decisions of federal appellate courts. An examination of the decisions Odin cites, however, reveals that the conflict is chimerical. The federal appellate cases Odin cites involve the very different question whether statutes that forbid the enforcement of forum selection clauses in franchise or construction contracts are preempted by the FAA when applied to arbitration agreements including such clauses. [Pet. 26-27] That may be an interesting and even important question, but cases resolving it hardly present a square conflict with a decision about the enforceability of an arbitration agreement involving a nursing home resident.

Turning to the issue actually directly involved in the case, Odin concedes that it has been able to locate only two other states that have statutes that are directly comparable to the Illinois laws at issue here – a concession that significantly undermines any suggestion that the issue presented here is of broad, national importance. And as to whether such statutes are preempted by the FAA, Odin cites only two unreported and unappealed federal trial-court rulings that touched on the preemption question [Pet. 26-27], neither of which involved a direct attempt to enforce an arbitration provision in a contract signed by a

nursing home resident. In other words, the issue presented has yet to reach either a state court of last resort or a federal appellate court, in this or any other case. If and when the issue is resolved at that level, its resolution presents a conflict, there will be ample time for the Court to address that issue.

In a final attempt to suggest the existence of a conflict of state supreme court authority, Odin cites rulings of the Oklahoma, Alabama, Mississippi, and Texas Supreme Courts on a different issue – whether contracts between nursing homes and their residents involve interstate commerce sufficiently to trigger application of the FAA. [Pet. 27-28] The decision below, however, did not even suggest that the FAA was inapplicable for that reason, and, indeed, assumed its applicability. Odin's claim that the Oklahoma state court's resolution of the interstate commerce issue indicates that they are "hostile" to the FAA might conceivably offer some reason for review of an Oklahoma decision based on the commerce rationale, but it is hardly a reason for reviewing an Illinois decision that did not even address that issue. In other words, even if there is a split among the state supreme courts as to whether contracts between nursing homes and their residents involve interstate commerce, this case simply does not present that question and such a split cannot be a basis for review.

In the end, this case involves only the views of one intermediate state appellate court on preemption of an unusual state statute. Based on Odin's own canvass of the judicial landscape, it is evidently the

first appellate court in the country to address preemption of such a statute. And its holding is not even definitive within its own state: the Illinois courts of appeals for other districts may conceivably resolve the issue differently, as may the Illinois Supreme Court, should a conflict among the lower state courts arise that requires resolution at a higher level. *Chapman v. Anchor Lumber*, 823 N.E.2d 594, 596 (3d Dist. Ill. App. 2005) (noting that Illinois has five appellate districts, and the decisions of one district are not binding on the others). Only at that point will the view of the Illinois courts be finally settled, and only if that view comes into conflict with decisions of other state courts of last resort or federal courts of appeals might an issue requiring resolution by this Court be presented.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 08-805

# In the Supreme Court of the United States

SSC ODIN OPERATING COMPANY LLC,
D/B/A ODIN HEALTH CARE CENTER, PETITIONER

*v.*

SUE CARTER, SPECIAL ADMINISTRATOR OF THE
ESTATE OF JOYCE GOTT

*ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT*

## REPLY BRIEF FOR THE PETITIONER

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## RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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## REPLY BRIEF FOR THE PETITIONER

Section 2 of the Federal Arbitration Act (FAA) provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). In *Southland Corp. v. Keating*, 465 U.S. 1 (1984), this Court held that (1) the substantive protections of § 2 govern state-court proceedings as well as those in federal court, and (2) generalized anti-waiver language in a state statute, which effectively precludes arbitration of disputes, does not constitute a ground that exists "at law or in equity for the revocation of any contract" within the meaning of § 2's savings clause even if the state statute does not expressly mention arbitration. In *Preston v. Ferrer*, 128 S. Ct. 978 (2008), this Court reaffirmed the viability of *Southland* and held that § 2 preempted a state statute even though the state statute did not expressly mention or otherwise specifically target arbitration for special treatment.

In direct conflict with *Southland* and *Preston*, the Illinois Court of Appeals in the case below held that § 2 does not preempt the generalized anti-waiver provisions of the Illinois Nursing Home Care Act (INHCA) because the "emphatically stated public policy" expressed in INHCA's anti-waiver provisions "concerns the validity, revocability, and enforceability of contracts generally and does not specifically target arbitration agreements." Pet. App. 10a. As explained in both the petition for a writ of certiorari filed by SSC Odin Operating Company LLC, doing

business as Odin Health Care Center (the Center), and the brief of *amici curiae* in support thereof,* the lower court's ruling cannot be reconciled with *Southland* and *Preston*. In addition, the lower court's ruling conflicts with the law of four federal circuits and presents substantial questions of federal law deserving of this Court's review.

At the Court's request, respondent Sue Carter has filed a response to the Center's petition. Ms. Carter's brief in opposition provides no persuasive reason for this Court to leave the lower court's conflicting ruling undisturbed, arguing to no avail that the Center's petition should be denied because Ms. Carter believes she will prevail on legal questions that were not decided by the court below and that would be addressed on remand. While it is true that Ms. Carter may raise legal arguments on remand that were presented to, but not decided by, the lower court, that fact is irrelevant for present purposes. What is relevant is the fact that the lower court's decision stands in direct conflict with *Southland* and *Preston*—something Ms. Carter makes no effort to refute. Accordingly, the Center's petition should be granted and the judgment below reversed summarily via a per curiam opinion. Alternatively, the Court should grant the petition for a writ of certiorari, consider this case on the merits and reverse the judgment of the lower court.

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* The Chamber of Commerce of the United States of America, the American Health Care Association, the Illinois Health Care Association, the Illinois Council on Long Term Care, and the Alliance for Quality Nursing Home Care filed a brief in support of the Center.

### A. Ms. Carter's Arguments in Defense of the Lower Court's Judgment Lack Merit

Despite this Court's request that she do so, Ms. Carter makes no attempt to refute the principal argument presented by the Center and its several *amici* that the lower court's ruling conflicts with *Southland* and *Preston*. Ms. Carter's brief in opposition does not even mention *Southland* or *Preston* even though the Center's petition and the brief of *amici* explained in detail why the lower court's ruling cannot be reconciled with *Southland* and *Preston*.

Instead, Ms. Carter attempts to divert this Court's attention to irrelevant issues of law on which the lower court did not pass and to misstating certain of this Court's FAA holdings. That effort fails.

1. According to Ms. Carter, the lower court's decision should not be disturbed because, were this Court to reverse that ruling and remand the case, Ms. Carter will have other grounds on which to challenge the arbitration agreements at issue in this case. *See* Br. in Opp. 4. Contrary to Ms. Carter's suggestion, however, simply because reversal of the lower court's ruling will result in additional litigation on remand does not counsel in favor of allowing the lower court's conflicting ruling to stand.

In *Perry v. Thomas*, 482 U.S. 483 (1987), for example, this Court reversed the ruling of the state court below and held that a state statute was preempted by the FAA. In so ruling, the Court refused to address an argument that the arbitration agreement in question was an unenforceable contract of adhesion because that issue "was not decided below . . . and may likewise be considered on remand." *Id.*

at 492 n.9. In the plainest of terms, *Perry* also explained that the assertion of an alternative ground for denying arbitration, which was not decided below and may be addressed on remand, "does not prevent [this Court] from reviewing the ground exclusively relied upon by the courts below" even if the alternative ground being asserted is that the respondent was not a party to the arbitration agreement in question. *Id.* at 492.

This Court is a "court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 719 n.7 (2005). Therefore, Ms. Carter's discussion of the merits of legal questions on which the lower court did not pass and would decide on remand is irrelevant. The exclusive ground relied upon by the court below was that the FAA does not preempt INHCA's generalized anti-waiver provisions. That decision cannot stand in light of *Southland* and *Preston*.

Even were this Court to consider the merits of Ms. Carter's argument, it should be rejected. Both arbitration agreements expressly provide that their terms bind persons such as Ms. Carter, stating: "It is the intention of the Facility and the Resident that this Agreement shall inure to the benefit of *and bind* . . . the Resident, his/her successors, assigns, agents, attorneys, insurers, heirs, trustees, and representatives, including the personal representative or executor of his or her estate; and the Legal Representative, his/her successors, assigns, agents, attorneys, insurers, heirs, trustees, and representatives or executor of his or her estate." Pet. App. 23a-24a, 30a-31a (emphasis added). Whether this contractual language may be enforced to require arbitration of the wrongful-death claim found in Ms. Carter's Com-

plaint is a question of law the lower court did not decide and would decide on remand.

Furthermore, Ms. Carter mistakenly asserts (Br. in Opp. 6) that there is no "contention that respondent Carter entered into any agreement to arbitrate any claim," and that the Center agrees Ms. Carter's wrongful-death claim "is not subject to the arbitration agreement [sic]." To the contrary, Ms. Carter signed one of the arbitration agreements in question. *See* Pet. App. 26a (evidencing Ms. Carter's signature as the "Legal Representative" of Ms. Gott). That agreement, in turn, expressly provides that its terms "continue to be valid for any stay at this Facility by this Resident, even when the Resident has been discharged and later readmitted." *Id.* at 25a. Therefore, Ms. Carter's assertions regarding the Complaint's wrongful-death cause of action are "nothing short of baffling." *Major League Players Ass'n v. Garvey*, 532 U.S. 504, 510 (2001) (per curiam); *see also Arthur Anderson LLP v. Carlisle*, No. 08-146, slip op. at 6-7 (U.S. May 4, 2009) (recognizing traditional state-law principles allow arbitration agreements to be enforced against nonparties to those agreements).

2. Nor is this merely an instance where the lower court "misapplied correctly stated legal principles to the particular Illinois statutes involved in this case." Br. in Opp. 9. As the Center's petition explained in detail (at 16-19), the lower court purported to apply only two of this Court's numerous FAA decisions: *Perry* and *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996). In doing so, the lower court not only misconstrued the holdings of *Perry* and *Casarotto*, it completely disregarded the holdings of *Southland*

and *Preston*. *See* Pet. 18 ("Read correctly, *Perry* and *Casarotto* stand for the proposition that § 2 of the FAA preempts those state laws that 'single out' arbitration agreements for special treatment. As demonstrated by *Southland* and *Preston*, however, *Perry* and *Casarotto* do *not* stand for the converse proposition: namely, that state laws avoid FAA preemption so long as they do not 'single out' arbitration agreements for special treatment.").

Ms. Carter's brief in opposition repeats this fundamental error. Not only does she completely disregard the holdings of *Southland* and *Preston*, Ms. Carter resorts to editing a quotation from one of this Court's decisions to support the lower court's flawed ruling, adding words to create a limitation not imposed by this Court. Specifically, Ms. Carter argues that "in enacting the FAA 'Congress *[only]* precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed upon the same footing as other contracts.'" Br. in Opp. 9 (purporting to quote *Perry*, 482 U.S. at 492 n.9) (brackets supplied by Ms. Carter; emphasis added). This argument is flawed for at least two reasons.

First, the language Ms. Carter purports to quote comes from *Casarotto*, not *Perry*. *See Casarotto*, 517 U.S. at 687 ("By enacting § 2, we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'") (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)).

Second and more importantly, Ms. Carter's argument turns on her addition of the word "[only]"—

an addition that misstates the holding of *Casarotto* and directly conflicts with *Southland* and *Preston*. As *Southland* and *Preston* make clear, § 2 does not *only* preempt state statutes that single out arbitration provisions for suspect status; instead, § 2 also preempts state statutes that, even if they do not expressly mention arbitration, have the effect of precluding arbitration.

3. The Center's petition also explained (at 19-24) how the decision below conflicts with the law of four federal circuits. According to Ms. Carter, however, the cases cited by the Center "involve the very different question whether statutes that forbid the enforcement of forum selection clauses in franchise or construction contracts are preempted by the FAA when applied to arbitration agreements including such clauses." Br. in Opp. 10.

While the circuit decisions cited by the petition involved statutes affecting industries other than the long-term care industry, that fact is immaterial. It is the *legal reasoning* of the circuit decisions that demonstrates the fallacy of the reasoning of the Appellate Court of Illinois. Contrary to the decision below, the federal courts of appeals have unanimously held that the FAA preempts state laws that invalidate only certain types of clauses in some, but not all, contracts, regardless of whether the state laws on their face "single out" arbitration for special treatment. *See Bradley v. Harris Research, Inc.*, 275 F.3d 884, 889-90 (9th Cir. 2001) (surveying rulings from the First, Second and Fifth Circuits and adopting their logic).

Ms. Carter's meager, one-paragraph response is that the circuit decisions involved franchise agree-

ments and construction contracts, not contracts between nursing facilities and their residents. *See* Br. in Opp. 10. She therefore characterizes as "chimerical" the conflict described in the Center's petition. *Id.* Tellingly, Ms. Carter makes no effort whatsoever to address the legal reasoning of the circuit rulings. As with her refusal to address the fact that the decision below conflicts with *Southland* and *Preston*, Ms. Carter has effectively chosen not to respond to the petition's argument that the ruling below also conflicts with the law of four federal circuits.

4. Nor has Ms. Carter refuted the Center's assertion (Pet. 24-29) that the petition raises substantial federal questions deserving of this Court's review. Instead, Ms. Carter repeatedly suggests that the petition should be denied because INHCA is an "unusual" statute. Br. in Opp. 1, 2, 11. The Center has "only" identified statutes identical to INHCA in two other States and the Center has "only" identified a conflict between federal and state courts within one of those States (i.e., Oklahoma). *Id.* at 10. The "views of one intermediate state appellate court on preemption of an unusual state statute," *id.* at 11, Ms. Carter contends, do not warrant this Court's review no matter how much the decision below conflicts with this Court's decisions or those of the federal courts of appeals. She is wrong.

One need go no further than *Preston* to refute Ms. Carter's assertion that the intermediate nature of the lower court in this case counsels against the granting of certiorari, for there the decision under review was that of the California Court of Appeal, not the Supreme Court of California. *See* 128 S. Ct. at 982; *see also* S. Ct. R. 10(c) (instructing that cer-

tiorari is appropriate when a state court has decided a federal question in a way that conflicts with decisions of this Court even if the state court in question is not of last resort).

Moreover, the lower court's use of the "singling out" theory, as explained in the Center's petition, is not an isolated occurrence of insignificant importance. It is "best viewed as a 'backdoor attempt to have the Supreme Court overrule *Southland*, which it already has refused to do.'" Pet. 24 (quoting Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 Ind. L.J. 393, 410 (2004)).

The national importance of the issues raised by this case is further evidenced by the *amicus* brief filed in support of the Center. Among other things, the brief of *amici* explains that the "erroneous reasoning of the lower court's decision threatens to spawn litigation over the enforceability of [arbitration] agreements and thereby deprive both businesses and consumers of the substantial benefits of arbitration." *Amici* Br. 1. In addition, the brief of *amici* argues that the arbitration agreements at issue in this case were "based on a model agreement used by nursing homes throughout the nation." *Id.* at 4-5. As with almost everything else in this case, however, Ms. Carter ignores the arguments of *amici* altogether.

### B. Summary Reversal Is Appropriate

Briefing on the merits and oral argument impose a burden on the Court and the parties. Such treatment is not necessary, however, when the decision under review conflicts with a previous decision of

this Court or when the logic of the lower court's decision is manifestly incorrect.

Under such circumstances, this Court has found it appropriate to grant the petition for a writ of certiorari and reverse the judgment of the lower court via a per curiam opinion. *See, e.g.*, *Spears v. United States*, 129 S. Ct. 840, 842 (2009) (per curiam) (reversing summarily lower court's ruling because controlling precedent "considered and rejected the position taken by the [court] below"); *Gonzales v. Thomas*, 547 U.S. 183, 185 (2006) (per curiam) (reversing summarily lower court's ruling because its error was "obvious in light of" controlling precedent); *Smith v. Texas*, 543 U.S. 37, 48 (2004) (per curiam) (reversing summarily state appellate court's ruling because there was "no principled distinction" between the jury instruction found to be unconstitutional by a previous decision of this Court and the jury instruction about which the petitioner complained); *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 57 (2003) (per curiam) (reversing summarily state court ruling imposing an unduly narrow interpretation of the FAA's "involving commerce" requirement because this Court's decision fell "well within [its] previous pronouncements").

Although the Center welcomes the opportunity to brief in further detail the merits of this dispute and to present oral argument, this is a case in which those efforts should be unnecessary. As explained in the petition (at 10-16) and in the brief of *amici* (at 5-11), the decision below conflicts with *Southland* and *Preston*. Ms. Carter makes no argument to the contrary, nor does she give any reason for why summary reversal would be inappropriate in this case.

Summary reversal is especially appropriate in this case since it would hopefully shorten the amount of time this case remains in the judicial system—something the Center sought to avoid altogether when it executed two unambiguous arbitration agreements several years (and several hundred attorney-hours) ago. Summary reversal would also send a clear message to state courts akin to that sent by this Court in *Alafabco*: this Court's jurisprudence is not to be contorted so that courts can exercise their age-old jealously in favor of retaining jurisdiction over disputes, the parties to which have previously agreed to binding arbitration.

* * * * *

Earlier this year, the Court explained that, "[g]iven the substantive supremacy of the FAA, but the Act's nonjurisdictional cast, state courts have a prominent role to play as enforcers of agreements to arbitrate." *Vaden v. Discover Bank*, 129 S. Ct. 1262, 1271-72 (2009). In playing that "prominent role," state courts must follow this Court's decisions interpreting the FAA. Unfortunately, clearly erroneous rulings such as that of the lower court below do not portend well. Only if this Court's FAA decisions are scrupulously applied will state-court rulings like that below become a thing of the past. To that end, the Court should "promptly remove from the menu the [lower court's] offering, a smuggled-in dish that is indigestible." *Spears*, 129 S. Ct. at 845.

For the foregoing reasons, as well those stated in the petition for a writ of certiorari and the brief of *amici*, the petition should be granted and the judgment of the Appellate Court of Illinois summarily re-

versed. Alternatively, the Court should grant the petition for a writ of certiorari, consider this case on the merits and reverse the judgment of the Appellate Court of Illinois.

Respectfully submitted.

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IN THE

# Supreme Court of the United States

SSC ODIN OPERATING COMPANY LLC,
D/B/A ODIN HEALTH CARE CENTER,
*Petitioner,*

v.

SUE CARTER, SPECIAL ADMINISTRATOR OF THE
ESTATE OF JOYCE GOTT,
*Respondent.*

**On Petition for a Writ of Certiorari to the Appellate Court of Illinois, Fifth District**

## BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE AMERICAN HEALTH CARE ASSOCIATION, THE ILLINOIS HEALTH CARE ASSOCIATION, THE ILLINOIS COUNCIL ON LONG-TERM CARE AND THE ALLIANCE FOR QUALITY NURSING HOME CARE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## QUESTIONS PRESENTED

1. Whether the lower court correctly held, in direct conflict with several of this Court's decisions, that an otherwise valid arbitration agreement was unenforceable solely on the basis of "public policy" embodied in a generalized anti-waiver provision of a state statute.

2. Whether, and to what extent, "public policy" qualifies as a ground for the "revocation of any contract" under Section 2 of the Federal Arbitration Act.

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## INTEREST OF *AMICI CURIAE*

*Amici curiae* represent organizations whose members share a keen interest in a robust, well-functioning system of arbitration in the United States. Many of *amici*'s members employ arbitration agreements in contracts with their customers. Unless corrected, the erroneous reasoning of the lower court's decision threatens to spawn litigation over the enforceability of those agreements and thereby deprive both businesses and consumers of the substantial benefits of arbitration.

The Chamber of Commerce of the United States of America ("Chamber") is the nation's largest federation of business companies and associations. It represents an underlying membership of more than three million business, trade and professional organizations of every size, sector and geographic region of the country. A principal function of the Chamber is to represent the interests of its members by filing briefs *amicus curiae* in cases involving issues of vital concern to the Nation's business community, including cases before this Court raising important questions under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§1 *et seq.*

The American Health Care Association ("AHCA") is the national representative of nearly 11,000 non-profit and proprietary facilities dedicated to improv-

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members or their counsel made a monetary contribution to its preparation or submission.

ing the delivery of professional and compassionate care to more than 1.5 million citizens who live in nursing facilities, assisted-living residences, subacute centers, and homes for persons with mental retardation and developmental disabilities. One way in which AHCA promotes the interests of its members is by participating as *amicus curiae* in cases with far-reaching consequences for its members, including cases brought under the FAA.

The Illinois Health Care Association ("IHCA") is a non-profit organization comprising approximately 500 licensed and certified long-term care facilities and programs throughout the State of Illinois. Founded in 1950, IHCA is the oldest and largest association of its kind in the State. Its members consist of proprietary and non-proprietary facilities which represent skilled, intermediate care, developmentally disabled, skilled pediatric, assisted living and sheltered care levels of care. Collectively, they provide health care to more than 31,000 people.

The Illinois Council on Long Term Care ("ICLTC"), founded in 1977, is a statewide, non-profit service association representing 24,000 long term care professionals and caregivers serving over 30,000 residents in nearly 200 Illinois nursing and rehabilitation facilities. One way in which the ICLTC promotes progressive public policy on behalf of its members is by participating as *amicus curiae* in cases with far-reaching consequences for the long term care profession.

The Alliance for Quality Nursing Home Care (the "Alliance") is a non-profit organization representing 17 national and regional post-acute providers, all of which offer skilled nursing facility services. Alliance members collectively operate nearly 2,000 facilities in

49 states. They treat as many as 500,000 patients each year and employ more than 300,000 people.

## SUMMARY OF THE ARGUMENT

Section 2 of the Federal Arbitration Act provides that arbitration agreements are valid, irrevocable, and enforceable except upon "grounds" that exist "for the revocation of any contract." 9 U.S.C. §2. The lower court interpreted this quoted language to invalidate a model arbitration agreement, used throughout the nation by nursing homes, on the basis of "public policy" contained in the anti-waiver provisions of Illinois's Nursing Home Care Act ("INHCA"). That holding rests on two legal propositions: (1) a narrow proposition that this "public policy" defense includes generalized anti-waiver language in a state statute and (2) a broad proposition that Section 2's grounds for "revocation of any contract" include "public policy."

This Court has squarely rejected the narrow proposition, and the decision below can be summarily reversed on that basis. *The grounds "for revocation of any contract" do not include a "public policy" based on a generalized anti-waiver provision in a state statute.* That was the central lesson of *Southland Corp. v. Keating*, 465 U.S. 1 (1984), where this Court rejected a similar effort by the California Supreme Court to invalidate an arbitration agreement on the basis of "public policy" contained in an anti-waiver provision of the California Franchise Investment Law. This Court's non-arbitrability decisions support *Southland's* central lesson. The consistent principle unifying those decisions is that the prerogative to override the FAA's "mandate" lies exclusively with Congress, not with state legislatures or the courts. *See Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220,

226 (1987). Disrespecting that principle, the decision below arrogates unprecedented power to state courts unilaterally to declare statutory claims non-arbitrable.

This Court has never directly addressed the broad proposition—whether Section 2's grounds "for revocation of any contract" include "public policy"—so, alternatively, it could grant the petition to resolve that question. The scope of Section 2 is critically important for companies using arbitration agreements. Some courts are relying on doctrines such as "public policy" and "unconscionability" to invalidate arbitration agreements. Yet, in many cases the so-called "applications" of these "general" doctrines are indistinguishable from rules that "single out arbitration," something that the FAA clearly disallows. In contrast to more fact-specific doctrines like fraud and duress, subjective, policy-laden doctrines like "public policy" and "unconscionability" sweep more broadly. They can invalidate entire classes of arbitration clauses or, as in this case, invalidate arbitration clauses in an entire industry. Such refusals to enforce arbitration agreements on the basis of "public policy" represented precisely the sort of "judicial hostility" which Congress, by enacting the FAA, sought to overcome. Thus, if this Court chooses not to summarily reverse on the narrow ground suggested above, it should grant the petition to clarify Section 2's scope.

Regardless of whether this Court summarily reverses the lower court's judgment on the narrow proposition or grants *certiorari* to address the broad one, the issues presented here are sufficiently important to warrant this Court's intervention. The arbitration agreement invalidated in this case was based on a model agreement used by nursing homes through-

out the nation. It provided residents and their guardians a choice whether to accept the benefits of arbitration such as speedier results, lower costs, and confidential proceedings. The decision below deprives individuals of this choice and thereby denies them the benefits of arbitration that this Court previously has recognized. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995). The decision below also encourages forum shopping. Not only does it deepen divides between federal and state courts, it invites arbitration's opponents to utilize Illinois, including the famous "plaintiff's haven" of Madison County, as a favorable forum in which to challenge these model arbitration agreements. Subsequent opinions handed down in the wake of the decision below provide concrete evidence that just such litigation will materialize unless this Court intervenes.

## ARGUMENT

### I. THIS COURT SHOULD SUMMARILY REVERSE THE DECISION BELOW AND REAFFIRM THE IMPORTANT PRINCIPLE THAT COURTS MAY NOT RELY ON GENERALIZED ANTI-WAIVER LANGUAGE IN STATUTES TO INVALIDATE ARBITRATION AGREEMENTS ON PUBLIC POLICY GROUNDS.

Several principles of law appear to be uncontested in this case. First, Section 2 of the Federal Arbitration Act applies in state court. *Preston v. Ferrer*, 128 S. Ct. 978, 983 (2008); *Southland*, 465 U.S. at 15-16. Second, under Section 2, arbitration agreements "shall be valid, irrevocable, and enforceable" except upon such grounds that exist "for the revocation of any contract." 9 U.S.C. §2. Third, this quoted language represents a "national policy favoring arbitra-

tion," *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006), and effectively "withdr[aws] the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 684 (1996) (quoting *Southland*, 465 U.S. at 10). Fourth, Section 2 consequently preempts both state legislative enactments *and judicial constructions* of those enactments which frustrate the FAA's national, arbitration-promoting objective. *Perry v. Thomas*, 482 U.S. 483, 492 n. 9 (1987).

The state court decision in this case, which effectively invalidates arbitration agreements across an entire industry, unquestionably undercuts the FAA's policy "requir[ing] that [courts] rigorously enforce agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985). So the only basis upon which the lower court's judgment can be sustained is if "public policy," as embodied in the INHCA's anti-waiver provisions, is a ground "for revocation of any contract."

This Court has never held—or even suggested—that the grounds "for revocation of any contract" include "public policy." The decisions referring to Section 2's defenses have used various formulations such as "fraud," *Southland*, 465 U.S. at 16 n. 11; "fraud, duress or unconscionability," *Casarotto*, 517 U.S. at 686; and "fraud or excessive economic power." *McMahon*, 482 U.S. at 226. So there is strong reason to believe that the lower court's reliance on "public policy" is simply erroneous. *See Cardegna*, 546 U.S. at 446 (rejecting state supreme court's view that "enforceability of the arbitration agreement should turn

on Florida public policy and contract law") (internal quotations omitted).

Yet, the Court does not need to resolve that question in order to summarily reverse the decision below. Even if public policy might qualify as a Section 2 "ground" in some hypothetical case—a position that *amici* do not concede—it cannot be stretched to include a generalized anti-waiver provision contained in a state statute. That was the central lesson of *Southland*. *Southland* involved California's Franchise Investment Law which contained an anti-waiver provision but did not specifically "single out" arbitration. 465 U.S. at 4 n. 1. As Justice Stevens recognized, the California Supreme Court relied on the public policy defense to invalidate an agreement requiring arbitration of claims arising under the franchise law. *Id.* at 19-21 (Stevens, J., concurring in part and dissenting in part). This Court reversed the California Supreme Court's judgment and held that invocation of a public policy based on an anti-waiver provision in a state statute did *not* qualify as a ground "for the revocation of *any* contract" but, instead, "conflict[ed] with the [FAA]." *Southland*, 465 U.S. at 16 n. 11.

This case is indistinguishable from *Southland*. Just like the California Franchise Investment Law, the INHCA contains generalized anti-waiver language that has been judicially construed to preclude arbitration. Indeed, by comparison to *Southland*, the conflict in this case between the state statute and the FAA is even more pronounced. Whereas the generalized anti-waiver language in *Southland* was merely directed at compliance with the franchise law's substantive provisions, the INHCA explicitly attempts to channel disputes toward litigation by making jury

waivers unenforceable. *Compare* 465 U.S. at 5 n. 1 (California law), *with* Pet. at 3 (Illinois law). Thus, on the authority of *Southland*, the lower court's "public policy" holding cannot stand.

This Court's jurisprudence on the arbitrability of statutory claims also supports this reading of *Southland*. In the decades following the FAA's enactment, this Court limited its application in cases involving certain claims arising under federal statutes, such as those arising under the federal securities laws. *See, e.g., Wilko v. Swan*, 346 U.S. 427 (1953), *overruled by Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). Those laws, just like the INHCA, contain generalized anti-waiver provisions that do not explicitly mention arbitration. *See Wilko*, 346 U.S. at 430 n. 6. More recent decisions reconsidered—and in some cases overruled—those early decisions in light of exploding dockets and a growing awareness of arbitration's efficacy. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30-32 (1991); *Rodriguez de Quijas*, 490 U.S. at 479-86; *McMahon*, 482 U.S. at 227-33. In the years that followed, this Court consistently held statutory disputes to be arbitrable even where those statutes were alleged to advance "important social policies." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000). *See also McMahon*, 482 U.S. at 226 ("[T]his duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights."). The upshot of these decisions is that the mere presence of an anti-waiver provision in a federal statute does not render disputes arising under the statute non-arbitrable. Rather, "[h]aving made the bargain to arbitrate, the party should be held to it unless *Congress itself* has evinced an intention to preclude a waiver of judicial

remedies for the statutory rights at issue." *Mitsubishi Motors Corp. v. Soler*, 473 U.S. 614, 627 (1985) (emphasis added). *See also McMahon*, 482 U.S. at 226 (FAA's "mandate may be overridden by a contrary *congressional* command.") (emphasis added).[2]

This Court's decision in *Mitsubishi* exemplifies the relationship between *Southland* and the limits on state power to regulate the arbitrability of disputes arising under state law. While *Mitsubishi* principally concerned the arbitrability of federal antitrust claims, the Court also addressed an ancillary argument that claims under local antitrust law were not arbitrable. The Court summarily rejected that view in a footnote explaining that "any contention that the local antitrust claims are non-arbitrable would be foreclosed by this Court's decision in [*Southland*] where we held that the [FAA] withdrew the power of the states to require a judicial forum for the resolu-

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[2] During the last legislative session, Congress considered bills that would have invalidated certain arbitration agreements between long-term care facilities and their residents (or persons acting on their behalf). *See* Fairness in Nursing Home Arbitration Act (H.R. 6126/S. 2838). Those bills validate *amici's* view that decisions about the arbitrability of disputes reside with Congress, not the courts. Those bills have not yet been reintroduced in the 111th Congress, and their reintroduction would not supply a reason to deny *certiorari*. In recent decades, Congress has considered numerous bills that would declare certain disputes off-limits from arbitration but, in the eighty four years since the FAA's adoption, only passed such legislation twice. *See* 15 U.S.C. §1226 (2006); 10 U.S.C. §987(f)(4) (2006). Moreover, the bills only apply to disputes or claims that arise *after* the date of their enactment. *See id.* §4. Thus, even if enacted, they would not affect this dispute or the numerous *existing* disputes around the country involving the enforceability of arbitration agreements in contracts with long-term care facilities.

tion of claims which the contracting parties agreed to resolve by arbitration." 473 U.S. at 623 n. 10 (internal quotations omitted).

Contrary to both *Mitsubishi* and the broader non-arbitrability jurisprudence, the decision below arrogates to state courts the power to override the FAA's mandate. The lower court tries to justify that power by distinguishing between a state legislative act and a judicial decision. *See* Pet. at 9a. That distinction collides with this Court's teachings in *Southland* and *Perry*. Both of those decisions stressed that the judge-made law of state courts, no less than state statutory law, can conflict with the FAA and, consequently, be preempted. *Southland*, 465 U.S. at 16 n. 11; *Perry*, 482 U.S. at 492 n. 9.

Here the conflict is unmistakable. Under the FAA, agreements to arbitrate INHCA claims are "valid, irrevocable, and enforceable." Under the lower court's construction, they are not. Consequently, the INHCA as construed by the lower court frustrates the FAA's "goals and policies." *Casarotto*, 517 U.S. at 688. *See McMahon*, 482 U.S. at 226 (Absent a claim of fraud or excessive economic power, the FAA "provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability."). Unless the decision below is corrected, state courts, by means of this "public policy" doctrine, will enjoy unparalleled power to declare disputes non-arbitrable—a power that neither state legislatures nor federal courts (or even this Court) currently enjoy.

Thus, on the authority of *Southland*, reinforced by this Court's more recent decisions on the arbitrability of statutory claims such as *Mitsubishi*, the grounds for "revocation of any contract" do not include "public

policy," at least where based on a generalized anti-waiver provision in a state statute. Once that narrow proposition of law is accepted, then the decision below cannot stand and should be summarily reversed.

## II. ALTERNATIVELY, THIS COURT SHOULD GRANT *CERTIORARI* TO DECIDE WHETHER THE GROUNDS "FOR REVOCATION OF ANY CONTRACT" INCLUDE "PUBLIC POLICY."

As noted above, this Court has never held that Section 2's grounds "for revocation of any contract" include "public policy." Nor have its descriptions of the scope of Section 2's "grounds" been consistent. *Southland* described Section 2 most narrowly to include only defenses such as "fraud." 465 U.S. at 16 n. 11. Dicta in *Casarotto* described Section 2 most broadly to encompass defenses "such as fraud, duress, or unconscionability." 517 U.S. at 686. This uncertainty over the scope of Section 2 has sown confusion among the lower courts and has allowed anti-arbitration rules masquerading as generally applicable contract defenses to creep into the FAA jurisprudence.

As the decision below illustrates, courts can repackage almost any judicially crafted anti-arbitration rule as an application of a general contract defense. Had the Illinois Legislature enacted a rule that declared arbitration clauses in long term-care contracts to be unenforceable, the FAA would have preempted such as statute. *See Preston*, 128 S. Ct. at 983. Despite that clear prohibition, the court below announced precisely the same rule and, by describing it as a specific application of the "public policy" doctrine, sought to avoid FAA preemption. Despite the differences in labels, both rules—the explicit anti-arbitration provision and the particular application of

the public policy defense—have precisely the same deleterious effect: they invalidate arbitration agreements and, thereby, undermine the FAA's "federal policy favoring arbitration." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

This thin line between anti-arbitration rules, which the FAA prohibits, and alleged applications of certain generally available contract defenses is evident from the number of courts relying on doctrines like "public policy" and unconscionability to invalidate arbitration agreements. *See, e.g., Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005) (arbitration clause containing class action waiver held unconscionable and contrary to public policy); *Kruger Clinic Orthopaedics, L.L.C. v. Regence BlueShield*, 138 P.3d 936 (Wash. 2006) (arbitration clause limiting remedies held unenforceable as contrary to public policy as embodied in state statute); *Presidential Leasing, Inc. v. Krout*, 896 So. 2d 938 (Fla. Dist. Ct. App. 2005) (arbitration clause held unenforceable as contrary to public policy embodied in statute's fee-shifting provision). These courts often fail meaningfully to explain—and indeed cannot explain—*why* particular features of an arbitration clause or arbitral regime satisfy the elements of a contract defense; rather they simply assert it to be so.

Such judicially crafted rules are far worse than state statutes that overtly discriminate against arbitration. Statutes at least have the virtue of clarity, and the legislative process enables a thorough inquiry into the underlying policies. By contrast, nebulous, judicially crafted rules "complicat[e] the law and breed[] litigation from a statute [the FAA]

that seeks to avoid it." *Allied-Bruce Terminix*, 513 U.S. at 275.

Certain of these so-called defenses also pose an especially grave threat to the "national policy favoring arbitration." *Cardegna*, 546 U.S. at 443. Some defenses such as fraud and duress usually end up only invalidating *specific* contracts. For example, if an arbitration agreement is void on duress grounds because one party has held a gun to the other party's head, that holding will not result in the invalidation of many arbitration clauses beyond the instant one before the Court. By contrast, others such as unconscionability and public policy threaten to sweep much more broadly. Invoking the unconscionability doctrine to invalidate a clause containing a particular set of features potentially invalidates all clauses with the offensive features. Invoking the public policy doctrine, as the decision below demonstrates, can sweep even more broadly and invalidate arbitration agreements across an entire industry, regardless of the agreement's content.

The history behind the FAA's enactment demonstrates the risk that state courts might embed their hostility toward arbitration agreements in such "public policy" arguments. As this Court previously has noted, the FAA was enacted to counter judicial hostility toward arbitration agreements. *Southland*, 465 U.S. at 13–14. The form of that historic hostility is illuminating—courts declared such agreements "void" on the grounds that they ousted the courts of jurisdiction and accordingly *violated "public policy."* Gary B. Born and Peter B. Rutledge, *International Civil Litigation in United States Courts* 1090 (3d ed. 2006). *See also Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 983-84 (2d Cir. 1942)

(describing how, prior to the FAA's enactment, American courts relied on public policy arguments to invalidate arbitration agreements). There is simply no difference between the historic "public policy" invalidations of the 19th century and the type of "public policy" invalidation effected by the court below. Both types of decisions ultimately represent the sort of jealous guarding of jurisdiction that the FAA sought to overcome. Unless corrected, the 21st century "public policy" doctrine threatens to usher in a new era of judicial hostility to arbitration agreements.

Finally, this Court's recent decision in *Cardegna* casts further doubt on the availability of "public policy" as a Section 2 defense. *Cardegna*, which also construed Section 2 of the FAA, involved whether judges or arbitrators should determine the enforceability of a contract containing an arbitration clause where there is an underlying claim that the contract is "void" under state law. Citing Florida contract law and "public policy," the Florida Supreme Court held that judges should decide the matter. This Court rejected that view and, citing *Southland*, held that the enforceability of the arbitration agreement should not "turn on 'Florida public policy and contract law.'" 546 U.S. at 446. While *Cardegna* concerned the doctrine of separability, its unequivocal rejection of the Florida Supreme Court's invocation of "public policy" lends further reason to be skeptical about the lower court's invocation of that doctrine in this case.

Thus, *certiorari* should be granted to offer further guidance to lower courts and parties over whether "public policy" qualifies as a "ground for the revocation of any contract" and, more generally, to clarify Section 2's scope.

## III. REGARDLESS OF WHETHER THE COURT SUMMARILY REVERSES OR GRANTS *CERTIORARI*, THE IMPORTANCE TO THE NURSING HOME INDUSTRY OF THE ISSUES PRESENTED IN THIS CASE JUSTIFIES THIS COURT'S INTERVENTION.

Enforceable arbitration agreements are important in disputes in many industries. These agreements are especially important in disputes between nursing homes and their residents. As a long-time nursing home provider recently explained to Congress:

> [A]rbitration is more efficient, less adversarial and has a reduced time to settlement. . . . Timely resolution of disputes is of unique importance to residents of long term care facilities. . . . In addition, because it vastly reduces transaction costs, arbitration may also enable patients and their families to retain a greater proportion of any financial settlement than with traditional litigation

*Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Judiciary Comm.*, (June 18, 2008) (statement of Kelley Rice-Schild, Executive Director, Floridean Nursing and Rehabilitation Center) ("Schild Testimony"), *available at http://aging.senate.gov/events/hr196kr.pdf.*

The agreement invalidated by the court below is based on a model agreement developed by the nursing home industry and used throughout the country.[3]

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[3] It also tracks the views of the Centers for Medicare & Medicaid Services, a division of the federal Department of Health and Human Services overseeing the nursing home industry, which has publicly stated that, at least in some cases,

In several respects, that model agreement seeks to harness the above-described benefits of arbitration:

- The resident or guardian's consent to arbitration is not a condition of admission, and declining to sign the form does not affect admission to the facility (indeed, in this case, the Respondent signed the arbitration agreement six days after the resident was admitted)
- Residents and their guardians enjoy a period during which they may rescind their agreement to arbitrate
- The nursing home company agrees to pay the arbitrator's fees and up to $5,000 of the resident's attorneys' fees
- The resident retains the absolute right to determine the situs of the arbitration

Pet. at 28a-32a. Thus, the model agreement in this case extends significant rights to residents in nursing homes. While *amici* should not be understood to suggest that such terms are *necessary* for an arbitration agreement to be enforceable, they validate this Court's oft-stated principle that arbitration can benefit individual litigants. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001); *Allied-Bruce Terminix*, 513 U.S. at 280. Yet by invalidating the model agreement on public policy grounds, the lower court's decision categorically deprives individuals of the right to choose these benefits.

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the use of an arbitration agreement "is an issue between the resident and the nursing home" provided that the resident's consent is not a condition of admission. *See* Dep't of Health and Human Services, Centers for Medicare & Medicaid Services, Memorandum of Steven A. Pelovitz, Director of Survey and Certification Group (Jan. 9, 2003).

The impact of the decision below extends far beyond the nursing home industry in Illinois. It lays the groundwork for similar invocations of public policy to invalidate arbitration agreements in other states and in other industries. Several states have enacted similar statutes which regulate the nursing home industry and contain generalized anti-waiver language. *See, e.g.*, N.Y. Pub. Health Law §2801-d (McKinney 2008) (residential health care facility law authorizing cause of action and containing anti-waiver provision); Okla. Stat. Ann. tit. 63, §1-1939 (West 2008) (same); W. Va. Code §16-5N-15 (2008) (same). States also have enacted legislation regulating other industries such as alcoholic beverages and hazardous substances through statutes that, like the INHCA, authorize a cause of action and contain generalized anti-waiver language. *See, e.g.*, Ala. Code §28-9-11 (2008) (beer wholesalers); Ark. Code Ann. §8-7-1010(c) (2008) (hazardous substances). Under the logic of the decision below, all of these statutes could easily be read to express a public policy necessitating the invalidation of agreements to arbitrate disputes arising under those statutes.

Finally, the decision below also encourages forum shopping, something that this Court has sought to discourage in its FAA jurisprudence. *Allied-Bruce Terminix*, 513 U.S. at 272. Not only does it deepen divides between several federal courts and other state courts, Pet. at 19-28, it also encourages parties seeking to circumvent their arbitration agreements to file suit in Illinois. Two other decisions of the Illinois appellate courts already have relied on the decision below to invalidate arbitration agreements. *See Mitchell v. Beverly Enterprises*, Slip Op. No. 5-07-0637 (Ill. App. 2008); *Blazier v. Beverly Enterprises*, Slip Op. No. 5-08-0011 (Ill. App. 2008). Both of those

cases, perhaps unsurprisingly, were filed in Madison County, Illinois which enjoys an unrivaled reputation as one of the most financially punitive venues in the country. *See Kelly v. Martin & Bayley, Inc.*, 503 F.3d 584, 585-86 (7th Cir. 2007). Given the financial vulnerability of the nursing home industry to costly and abusive litigation, *see* Schild Testimony at 5-6, the decision below threatens to unleash a flood of financially crippling lawsuits.

## CONCLUSION

For the foregoing reasons, the Court should summarily reverse the decision below or, alternatively, grant the petition for a writ of *certiorari*.

Respectfully submitted,

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